No. 04-1084

# In the Supreme Court of the United States

ALBERTO R. GONZALES, ET AL., PETITIONERS

*v.*

O CENTRO ESPIRITA BENEFICIENTE UNIAO DO VEGETAL, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTHCIRCUIT*

## APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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No. 02-2323

O CENTRO ESPIRITA BENEFICIENTE UNIAO DO VEGETAL, ALSO KNOWN AS UNIAO DO VEGETAL (USA), INC., A NEW MEXICO CORPORATION ON ITS OWN BEHALF AND ON BEHALF OF ALL ITS MEMBERS IN THE UNITED STATES; JEFFREY BRONFMAN, INDIVIDUALLY AND AS PRESIDENT OF UDV-USA; DANIEL TUCKER, INDIVIDUALLY AND AS VICE-PRESIDENT OF UDV-USA; CHRISTINA BARRETO, INDIVIDUALLY AND AS SECRETARY OF UDV-USA; FERNANDO BARRETO, INDIVIDUALLY AND AS TREASURER OF UDV-USA; CHRISTINE BERMAN; MITCHEL BERMAN; JUSSARA DE ALMEIDA DIAS, ALSO KNOWN AS JUSSARA ALMEIDA DIAS; PATRICIA DOMINGO; DAVID LENDERTS; DAVID MARTIN; MARIA EUGENIA PELAEZ; BRYAN REA; DON ST. JOHN; CARMEN TUCKER; SOLAR LAW, INDIVIDUALLY AND AS MEMBERS OF UDV-USA,
PLAINTIFFS-APPELLEES

*v.*

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES; ASA HUTCHINSON, ADMINISTRATOR OF THE UNITED STATES DRUG ENFORCEMENT ADMINISTRATION; PAUL H. O'NEILL, SECRETARY OF THE DEPARTMENT OF TREASURY OF THE UNITED STATES; DAVID C. IGLESIAS, UNITED STATES ATTORNEY FOR THE DISTRICT OF NEW MEXICO; DAVID F. FRY, RESIDENT SPECIAL AGENT IN CHARGE OF THE UNITED STATES CUSTOMS SERVICE OFFICE OF CRIMINAL INVESTIGATION IN ALBUQUERQUE, NEW MEXICO; ALL IN THEIR OFFICIAL CAPACITIES,
DEFENDANTS-APPELLANTS

CHRISTIAN LEGAL SOCIETY; THE NATIONAL ASSOCIATION OF EVANGELICALS; CLIFTON KIRKPATRICK, AS THE STATED CLERK OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A.); QUEENS FEDERATION OF CHURCHES, AMICUS CURIAE

[Filed: Nov. 12, 2004]

**ON REHEARING EN BANC APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO (D.C. No. CIV-00-1647 JP/RLP)**

Before: TACHA, Chief Judge, SEYMOUR, PORFILIO, EBEL, KELLY, HENRY, BRISCOE, LUCERO, MURPHY, HARTZ, O'BRIEN, MCCONNELL, and TYMKOVICH, Circuit Judges.

PER CURIAM.

**I.**

This matter is before the *en banc* court to review issues emanating from the panel opinion in *O Centro Espirita Beneficiente Uniao Do Vegetal* v. *Ashcroft*, 342 F.3d 1170 (10th Cir. 2003). The panel affirmed a preliminary injunction, granted under the Religious Freedom Restoration Act ("RFRA"), which enjoined the United States from relying on the Controlled Substances Act ("CSA") and the United Nations Convention on Psychotropic Substances ("Convention") to prohibit the sacramental use of *hoasca* by Uniao do Vegetal and its members (collectively "UDV"). This court granted rehearing to review the different stan-

dards by which we evaluate the grant of preliminary injunctions, and to decide how those standards should be applied in this case.

**II.**

The underlying facts relating to the parties and the issues are fully described in the panel opinion and are therefore unnecessary to reiterate here. UDV invoked RFRA, 42 U.S.C. § 2000bb-1, to obtain declaratory and injunctive relief which would prevent the government from prohibiting UDV's importation, possession, and use of *hoasca* for religious purposes and from attempting to seize the substance or prosecute individual UDV members.[1] After an evidentiary hearing, the district court granted UDV's motion for a preliminary injunction pending a decision on the merits. The government appealed that decision, the panel affirmed, and we granted the *en banc* petition.[2]

**III.**

The *en banc* court is divided over the outcome of this case. Nevertheless, a majority of the court has voted to maintain a heightened standard for granting any of the three historically disfavored preliminary injunctions. A different majority has voted to affirm the district court's entry of a preliminary injunction in this case.

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[1] *Hoasca* is a liquid tea-like mixture made from the plants psychotria viridis and banisteriposis caapi. These plants are indigenous to Brazil. Psychotria viridis contains dimethyltryptamine (DMT), which is listed on Schedule I of the CSA and the Convention.

[2] This court granted an emergency stay of the preliminary injunction pending appeal. *See O Centro Espirita* v. *Ashcroft*, 314 F.3d 463 (10th Cir. 2002).

**A. Standards for Granting Disfavored Preliminary Injunctions**

In *SCFC ILC, Inc.* v. *Visa USA, Inc.* , this court identified the following three types of specifically disfavored preliminary injunctions and concluded that a movant must "satisfy an even heavier burden of showing that the four [preliminary injunction] factors . . . weigh heavily and compellingly in movant's favor before such an injunction may be issued": (1) preliminary injunctions that alter the status quo; (2) mandatory preliminary injunctions; and (3) preliminary injunctions that afford the movant all the relief that it could recover at the conclusion of a full trial on the merits. 936 F.2d 1096, 1098-99 (10th Cir. 1991). With one important alteration, a majority of the *en banc* court has voted to affirm the core holding of *SCFC ILC*. Part I of the Opinion of Murphy, J., joined by Ebel, Kelly, Hartz, O'Brien, McConnell, and Tymkovich, JJ.; Part I of the Opinion of McConnell, J, joined by Hartz, O'Brien, and Tymkovich, JJ. Thus, if a movant seeks a preliminary injunction that falls into one of the three categories identified in *SCFC ILC*, the movant must satisfy a heightened burden. The *en banc* court does, however, jettison that part of *SCFC ILC* which describes the showing the movant must make in such situations as "heavily and compellingly." *SCFC ILC*, 936 F.2d at 1098. Instead, the *en banc* court holds that courts in this Circuit must recognize that any preliminary injunction fitting within one of the disfavored categories must be more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course. Furthermore, because a historically disfavored preliminary injunction operates outside of the normal parameters for interim

relief, movants seeking such an injunction are not entitled to rely on this Circuit's modified-likelihood-of-success-on-the-merits standard. Instead, a party seeking such an injunction must make a strong showing both with regard to the likelihood of success on the merits and with regard to the balance of harms, and may not rely on our modified likelihood-of-success-on-the-merits standard.

**B. Grant of Preliminary Injunction in this Case**

Although the reasons vary, a majority of the *en banc* court is of the view that the district court's entry of a preliminary injunction in this case should be affirmed. Part II of Opinion of Seymour, J., joined by Tacha, C.J., and Porfilio, Henry, Briscoe, Lucero, McConnell, and Tymkovich, JJ.; Part II of the Opinion of McConnell, J., joined by Tymkovich, J.

**VI.**

The decision of the United States District Court for the District of New Mexico to grant UDV's request for a preliminary injunction is hereby **AFFIRMED**. The temporary stay of the district court's preliminary injunction issued by this court pending resolution of this appeal is vacated.

**MURPHY**, Circuit Judge, joined in full by **EBEL**, **KELLY**, and **O'BRIEN**, Circuit Judges, and as to Part I by **HARTZ**, **MCCONNELL**, and **TYMKOVICH**, Circuit Judges, concurring in part and dissenting in part.

I agree with the *per curiam* opinion that a movant for a preliminary injunction must make a heightened showing when the requested injunction will alter the status quo. As set out more fully below, such an approach is completely consistent with the historic purpose of the preliminary injunction. Accordingly, I join parts I, II, and III.A of the *per curiam* opinion. I must respectfully dissent, however, from the conclusion that O Centro Espirita Beneficiente Uniao do Vegetal ("UDV") has sufficiently shown its entitlement to a preliminary injunction prohibiting the United States from enforcing the Controlled Substances Act ("CSA"), 21 U.S.C. § 801 *et seq*. As a direct result of the preliminary injunction embraced by the majority, the United States is placed in violation of the United Nations Convention on Psychotropic Substances, Feb. 21, 1971, 32 U.S.T. 543 (hereinafter the "Convention"). I thus dissent from parts III.B and IV of the *per curiam* opinion.

## I.

### A. A Heightened Showing is Appropriate When the Requested Preliminary Injunction Would Alter the Status Quo

The Supreme Court has observed "that a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek* v. *Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) (quotation omitted); *accord SCFC ILC, Inc.* v.

*VISA USA, Inc.*, 936 F.2d 1096, 1098 (10th Cir. 1991) ("As a preliminary injunction is an extraordinary remedy, the right to relief must be clear and unequivocal." (citation omitted)); *United States ex rel. Citizen Band Potawatomi Indian Tribe of Okla.* v. *Enter. Mgmt. Consultants, Inc.*, 883 F.2d 886, 888-89 (10th Cir. 1989) ("Because it constitutes drastic relief to be provided with caution, a preliminary injunction should be granted only in cases where the necessity for it is clearly established."). The Supreme Court has further indicated that the "limited purpose" of a preliminary injunction "is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex.* v. *Camenisch*, 451 U.S. 390, 395 (1981). Accordingly, courts should be hesitant to grant the extraordinary interim relief of a preliminary injunction in any particular case, but especially so when such an injunction would alter the status quo prior to a trial on the merits.

This court's precedents are in harmony with the sentiments expressed by the Supreme Court in *Mazurek* and *Camenisch*. In particular, this court has identified the following three types of disfavored preliminary injunctions and concluded that a movant must make a heightened showing to demonstrate entitlement to preliminary relief: "(1) a preliminary injunction that disturbs the status quo; (2) a preliminary injunction that is mandatory as opposed to prohibitory; and (3) a preliminary injunction that affords the movant substantially all the relief he may recover at the conclusion of a full trial on the merits." *SCFC ILC*, 936 F.2d at 1098-99. Because each of these types of preliminary injunction is at least partially at odds with the historic purpose of the preliminary injunction—the preserva-

tion of the status quo pending a trial on the merits —this court has held that to obtain such an injunction the movant must demonstrate that "on balance, the four [preliminary injunction] factors weigh heavily and compellingly in his favor." *Id.* at 1099.

The *en banc* court specifically reaffirms the central holding in *SCFC ILC* that a movant seeking a preliminary injunction which upsets the status quo must satisfy a heightened burden. In advocating the abandonment of this requirement, Judge Seymour suggests that requiring a heightened showing when a requested preliminary injunction would alter the status quo is inconsistent with the need to prevent irreparable harm and is inconsistent with the approaches taken by other circuits. Opinion of Seymour, J., at 4-6. Neither assertion offers a convincing reason for abandoning the well-reasoned approach set out in *SCFC ILC*.

It is simply wrong to assert that the application of heightened scrutiny to preliminary injunctions which alter the status quo is inconsistent with the purpose of preliminary injunctions. The underlying purpose of the preliminary injunction is to "preserve the relative positions of the parties until a trial on the merits can be held." *Camenisch*, 451 U.S. at 395; *see also* 11A Charles Alan Wright et al., Federal Practice and Procedure § 2947, at 123 (2d ed. 1995) [hereinafter "Wright & Miller"] (noting that the purpose of the preliminary injunction is to assure that the non-movant does not take unilateral action which would prevent the court from providing effective relief to the movant should the movant prevail on the merits). Although the prevention of harm to the movant is certainly a purpose of the preliminary injunction, it is not the paramount purpose. *See* Wright & Miller § 2947, at 123 (noting that although

the prevention of harm to the movant is an important factor to be considered in deciding whether to grant a preliminary injunction, the primary purpose for such an order is "the need to prevent the judicial process from being rendered futile by defendant's action or refusal to act"). Because a preliminary injunction which alters the status quo is generally contrary to this traditional purpose, such an injunction deserves some form of heightened scrutiny. *See id.* § 2948, at 133-35 & n.11 (collecting cases for proposition that "the purpose of the preliminary injunction is the preservation of the status quo and that an injunction may not issue if it would disturb the status quo"). Such an approach is supported by strong policy rationales.

Any injury resulting from a preliminary injunction that merely preserves the status quo is not a judicially inflicted injury. Instead, such injury occurs at the hands of a party or other extrajudicial influence. By contrast, an injury resulting from a preliminary injunction that disturbs the status quo by changing the relationship of the parties *is* a judicially inflicted injury. It is injury that would not have occurred but for the court's intervention and one inflicted before a resolution of the merits. Because the issuing court bears extra responsibility should such injury occur, it should correspondingly be particularly hesitant to grant an injunction altering the status quo unless the movant makes an appropriate showing that the exigencies of the case require extraordinary interim relief. It may be small consolation should the issuing court ultimately resolve the merits in favor of the non-moving party; at that point the non-moving party has often incurred significant costs as a result of abiding by the improvi-

dent preliminary injunction.[1] A plaintiff who was willing to live with the status quo before filing its complaint should meet a higher standard in order to have the court intervene with an injunction that alters the status quo. Judge Seymour's approach, which seeks to elevate the importance of irreparable harm at the expense of the status quo, is inconsistent with the historic underpinnings of the preliminary injunction.

Nor is the failure of other courts to adequately distinguish between mandatory injunctions and injunctions that alter the status quo a sufficient reason to abandon *SCFC ILC*. *See* Opinion of Seymour, J., at 4 & n.1. In asserting that preliminary injunctions which alter the status quo should not be an independent disfavored category, Judge Seymour relies heavily on the fact that in cataloging the types of disfavored injunc-

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[1] *See generally* Wright & Miller § 2947, at 123. According to Professor Wright,

> The circumstances in which a preliminary injunction may be granted are not prescribed by the Federal Rules. As a result, the grant or denial of a preliminary injunction remains a matter for the trial court's discretion, which is exercised in conformity with historic federal equity practice. Although the fundamental fairness of preventing irremediable harm to a party is an important factor on the preliminary injunction application, the most compelling reason in favor of entering a Rule 65(a) order is the need to prevent the judicial process from being rendered futile by defendant's action or refusal to act. On the other hand, judicial intervention before the merits have been finally determined frequently imposes a burden on defendant that ultimately turns out to have been unjustified. Consequently, the preliminary injunction is appropriate whenever the policy of preserving the court's power to decide the case effectively outweighs the risk of imposing an interim restraint before it has done so.

*Id.* (footnotes omitted).

tions, no other court has chosen to specifically distinguish between preliminary injunctions which alter the status quo and preliminary injunctions which are mandatory. *Id.* None of the cases cited by Judge Seymour, however, contain any discussion of this question. Instead, those cases simply note, almost reflexively, that any preliminary injunction which alters the status quo is a mandatory injunction and, thus, subject to heightened scrutiny. *Id*. (collecting cases). The reflexive equation of preliminary injunctions which alter the status quo with mandatory injunctions by the courts cited by Judge Seymour is simply not a compelling justification to abandon the reasoned approach from *SCFC ILC*.

In any event, it is certainly true that courts have historically applied a more stringent standard to mandatory preliminary injunctions for the very reason that those injunctions generally do alter the status quo. *See*, *e.g.*, *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 526 (4th Cir. 2003); *Tom Doherty Assocs.* v. *Saban Entm't, Inc.*, 60 F.3d 27, 34 (2d Cir. 1995); *Anderson* v. *United States*, 612 F.2d 1112, 1114 (9th Cir. 1979). In fact, most courts decide whether a given preliminary injunction is "mandatory" or "prohibitory" by determining whether or not it alters the status quo. *See*, *e.g.*, *Tom Doherty Assocs.*, 60 F.3d at 34; *Acierno* v. *New Castle County*, 40 F.3d 645, 647 (3d Cir. 1994); *Stanley* v. *Univ. of S. Cal.*, 13 F.3d 1313, 1319 (9th Cir. 1994); *Martinez* v. *Mathews*, 544 F.2d 1233, 1242-43 (5th Cir. 1976). For these courts, then, the question whether an injunction is mandatory or prohibitory is merely a proxy for the more significant question whether an injunction alters the status quo. Thus, to the extent these two categories do overlap, it is indeed strange to

keep the proxy while jettisoning the underlying consideration giving rise to that proxy. *See* Opinion of Seymour, J., at 4, 9-10 (advocating the abandonment of heightened scrutiny for injunctions which alter the status quo, while maintaining heightened scrutiny for mandatory injunctions).

There is good reason, however, to distinguish between mandatory injunctions and injunctions which alter the status quo and to treat both types as disfavored. As set out above, "[a] preliminary injunction that alters the status quo goes beyond the traditional purpose for preliminary injunctions, which is only to preserve the status quo until a trial on the merits may be had." *SCFC ILC*, 936 F.2d at 1099. Although mandatory injunctions also generally alter the status quo, that is not always the case. It is not at all difficult to envision situations where a mandatory injunction would preserve the status quo and a prohibitory injunction would alter the status quo. *See Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816, 830 n.21 (D.C. Cir. 1984) (noting that whether a mandatory or prohibitory injunction will maintain or alter the status quo depends on whether the status quo is a "condition of action" or a "condition of rest"). Without regard to whether a mandatory preliminary injunction alters the status quo, however, it is still appropriate to disfavor such injunctions "because they affirmatively require the nonmovant to act in a particular way, and as a result they place the issuing court in a position where it may have to provide ongoing supervision to assure the nonmovant is abiding by the injunction." *SCFC ILC*, 936 F.2d at 1099. Thus, it is simply incorrect to assert that there is perfect overlap between these two categories and that the concept of status quo should be

folded into the question whether an injunction is mandatory or prohibitory. The fact that other courts have failed to recognize these subtle distinctions is simply no reason to abandon the three artfully drawn categories set out in *SCFC ILC*.

For these reasons, the court is correct in reaffirming the central holding in *SCFC ILC* that a movant seeking a preliminary injunction which upsets the status quo must satisfy a heightened burden. Nevertheless, the decision to jettison *SCFC ILC's* "heavily and compellingly" language as the articulated standard for granting any of the three types of disfavored preliminary injunctions is appropriate. It is enough to note that courts in this Circuit should recognize that each of the three types of injunction identified above is disfavored and that a request for such an injunction should be even more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is certainly extraordinary. *See Enter. Mgmt. Consultants*, 883 F.2d at 888 (holding that even a traditional injunction, i.e., an injunction which preserves the status quo, is an "extraordinary" and "drastic" remedy). Furthermore, because a preliminary injunction that alters the status quo operates outside the historic parameters for such interim relief, movants should not be able to rely on this Circuit's modified-likelihood-of-success-on-the-merits standard. Instead, in addition to making a strong showing that the balance of the harms tips in its favor and that the preliminary injunction is not adverse to the public interest, a movant seeking a preliminary injunction that alters the status quo should always have

to demonstrate a substantial likelihood of success on the merits.[2]

**B. The Status Quo in This Case is the Enforcement of the CSA and Compliance with the Convention**

The status quo *in fact* in this case is the enforcement of the CSA and compliance with the Convention. The record is clear that both UDV itself and the United States recognized that the importation and consumption of *hoasca* violated the CSA. UDV made a concerted effort to keep secret its importation and use of *hoasca*. On the relevant import forms, UDV officials in the United States generally referred to *hoasca* as an "herbal tea"; they never called it *hoasca* or ayahuasca or disclosed that it contained DMT. UDV president Jeffrey Bronfman informed customs brokers that the substance being imported was an "herbal extract" to be used by UDV members as a "health supplement." Furthermore, in an e-mail drafted by Bronfman, he

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[2] Judge Seymour is simply incorrect in implying that the application of heightened scrutiny to preliminary injunctions that alter the status quo is inconsistent with the need to prevent irreparable harm. Opinion of Seymour, J., at 6-7. Instead, such an approach recognizes that preliminary injunctions which alter the status quo, an unconventional and historically disfavored type of interim relief, are far more likely to impose untoward costs on the non-moving party. For that reason, and because of the attendant costs imposed on the judiciary by such preliminary injunctions, it is appropriate to require that movants make a heightened showing as a predicate to obtaining a preliminary injunction which alters the status quo. Such a system is sufficiently flexible to allow courts to grant a preliminary injunction which alters the status quo when the harm to the movant is clear, certain, and irreparable; the balance of harms undoubtedly tips in favor of the movant; and the movant demonstrates a substantial likelihood of success on the merits.

emphasized the need for confidentiality regarding UDV's "sessions" involving *hoasca*: "Some people do not yet realize what confidentiality is and how careful we need to be. People should not be talking publicly anywhere about our sessions, where we have them and who attends them." When UDV attempted to grow psychotria viridis and banisteriopsis caapi[3] in the United States, it imported the seeds and plants "clandestinely," in the words used by UDV, and required its members to sign confidentiality agreements to keep their attempts secret. All of these actions by UDV demonstrate a recognition that its importation and consumption of *hoasca* violated the CSA. Likewise, when the United States realized that UDV was importing a preparation which contained DMT, it seized that shipment and additional quantities of the preparation found in a search of Bronfman's residence. Accordingly, although UDV eventually sought a preliminary injunction after the seizure of the *hoasca*, at all times leading up to that event the record reveals that the status quo was the enforcement of the CSA. Where one party, here UDV, intentionally precludes a contest by concealing material information, the status quo must be determined as of the time all parties knew or should have known all material information.

Although recognizing that UDV "acted in a somewhat clandestine manner in the course of importing the *hoasca* and using it in its religious ceremonies," Judge Seymour nevertheless asserts that UDV's importation and use of *hoasca* is still the status quo because UDV's actions were "premised on its firmly held belief that such religious activity was in fact protected from

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[3] These are the two plants utilized to brew *hoasca*.

government interference by its right to the free exercise of its religion." Opinion of Seymour, J., at 19 n.3. It is odd, indeed, to assume that UDV thought its actions were entirely lawful and protected by the Religious Freedom Restoration Act ("RFRA") or the First Amendment, in light of the fact that all of its actions were taken in secret. In any event, UDV's reason for doing what it was doing is irrelevant. It simply cannot be the case that a party can establish the status quo in a given case through secretive or clandestine activity. There is enough natural incentive to manipulation in events preceding litigation, and in litigation itself, without providing judicial endorsement of surreptitious conduct by wrapping it in a cloak of "status quo." The "last peaceable uncontested status existing between the parties before the dispute developed," 11A Wright & Miller § 2948, at 136, is most surely the open and notorious actions of the parties before the dispute. Here, it is uncontested that the open and notorious actions of UDV were a facade of compliance with the CSA. Thus, the status quo in this case is the government's enforcement of the CSA.

What is most strange about the approach advocated by Judge Seymour is its apparent reliance on the legal rights of the parties in arriving at the status quo in this case. Although disclaiming such an approach, Opinion of Seymour, J., at 18, Judge Seymour specifically references the parties' legal rights in determining the status quo in this case. *Id.* ("[W]e are faced with a conflict between two federal statutes, RFRA and the CSA, plus an international treaty, which collectively generate important competing status quos."). If the status quo is both parties exercising their legal rights, but the mutual and contemporaneous exercise of those rights is

factually impossible, then the status quo must instead be the exercise of legal rights by only one party. Judge Seymour has not cited a single case to support the assertion that status quo is determined by reference to a party's legal rights. Furthermore, such an approach is clearly inconsistent with this Circuit's historic understanding of what constitutes the status quo. *SCFC ILC*, 936 F.2d at 1100 ("The status quo is not defined by the [parties'] existing *legal rights*; it is defined by the *reality* of the existing status and relationships between the parties, regardless of whether the existing status and relationships may ultimately be found to be in accord or not in accord with the parties' legal rights."). Finally, such an approach is completely unhinged from the reality of the parties' extant relationship and from the historic purposes of the preliminary injunction. For instance, under Judge Seymour's view of what constitutes the status quo, it would not be determinative had the government at first knowingly acquiesced in UDV's consumption of *hoasca*, believing that such consumption was protected by RFRA, before eventually changing tack and deciding to enforce the CSA. Instead, under Judge Seymour's approach, a relevant consideration for status quo purposes is whether the government was at all times legally entitled to enforce the CSA.[4] This is

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[4] Likewise, envision two parties to a long-term contract. For a number of years both parties have operated with an identical understanding of a key provision of the contract. Party A suddenly changes course and adopts a different view of the contract. Facing irreparable injury, party B brings a declaratory judgment action and seeks a preliminary injunction to preserve the status quo pending resolution of the suit. Under Judge Seymour's approach, the parties' course of conduct would be irrelevant to the question of status quo. Instead, the status quo would be determined by the merits of the parties' legal assertions. That is, if the

clearly a question of whether UDV is likely to prevail on the merits. Thus, if a party is likely to prevail on the merits, Judge Seymour would label that merits analysis the status quo and then use it a second time to reduce the movant's burden on the final three preliminary injunction factors. Such an approach lacks logical moorings.

**C. Conclusion**

In sum, a heightened standard is consistent with the historical underpinnings of the preliminary injunction and is supported by persuasive policy rationales. Furthermore, this court's delineation in *SCFC ILC* of three types of disfavored preliminary injunction is well-reasoned and consistent with the historic purpose of the preliminary injunction; *SCFC ILC* should not be completely abandoned simply because other courts have chosen a different course. The status quo in this case is the government's enforcement of the CSA and compliance with the Convention. Accordingly, when analyzing whether UDV is entitled to its requested preliminary injunction, this court will recognize that the requested injunction is disfavored and more closely scrutinize the request to assure that the exigencies of the case support the granting of a particularly extraordinary remedy.[5]

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district court determined on a preliminary and incomplete record that party A was likely to prevail on the merits, the status quo would be party A's revised interpretation of the contract. Such an approach is surely at odds with any basic understanding of what constitutes the status quo.

[5] As noted in the panel dissent, because the district court did not recognize that the requested preliminary injunction would change the status quo, it did not subject UDV's request to any special scrutiny. *O Centro Espirita Beneficiente Uniao do Vegetal*

II.

Based heavily on the conclusion that UDV has demonstrated a substantial likelihood of success on the merits, a majority of the *en banc* court resolves that the district court did not err in granting UDV a preliminary injunction. In contrast to the conclusions of the majority, however, UDV has not demonstrated a substantial likelihood of success on the merits. First, RFRA was intended to restore the compelling interest test that existed before *Employment Division v. Smith*, 494 U.S. 872 (1990). 42 U.S.C. § 2000bb(b)(1). Employing that test, courts routinely rejected religious exemptions from laws regulating controlled substances and have continued to do so with RFRA. Second, one only need look to the congressional findings set out in the CSA to see that the United States carried its burden of demonstrating that the prohibition against importing or consuming *hoasca* furthers its compelling interests in protecting the health of UDV members and preventing diversion of *hoasca* to non-religious uses. Finally, compliance with the Convention, which results in international cooperation in curtailing illicit drug trafficking, is certainly a compelling interest. The record further indicates that absent strict compliance with the Convention, the United States' efforts in this regard would be hampered.

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*v. Ashcroft*, 342 F.3d 1170, 1190 (10th Cir. 2003) (Murphy, J., dissenting). The failure of the district court to apply the correct standard in evaluating UDV's request for a preliminary injunction amounts to an abuse of discretion. *SCFC ILC, Inc. v. Visa USA, Inc.*, 936 F.3d 1096, 1100 (10th Cir. 1991). Nevertheless, because the record on appeal is sufficiently well developed, it is appropriate for this court to determine in the first instance whether UDV has met the requisite burden. *O Centro Espirita*, 342 F.3d at 1190 (Murphy, J., dissenting) (citing *SCFC ILC*, 936 F.2d at 1100).

Quite aside from the question of whether UDV has demonstrated it is substantially likely to prevail on the merits, UDV has not demonstrated its entitlement to a preliminary injunction. In connection with the risk to the health of UDV members and the risk to the public from diversion of hoasca, the district court found the evidence respectively "in equipoise" and "virtually balanced." The district court did not proceed to even address the harm to the government and the public interest resulting from violations of the Convention necessitated by its injunction. With the evidence in this state, UDV has not carried its burden of demonstrating that the third and fourth preliminary injunction factors —that the threatened injury to it outweighs the injury to the United States under the preliminary injunction and that the injunction is not adverse to the public interest—weigh in its favor thereby justifying even a preliminary injunction that does not alter the status quo. Superimposing the more appropriate heightened scrutiny for a disfavored injunction altering the status quo upon the evidence in this case renders the preliminary injunction even more decidedly erroneous.

**A. Substantial Likelihood of Success on the Merits**

*1. Controlled Substances Act*

RFRA was never intended to result in the kind of case-by-case evaluation of the controlled substances laws, and the scheduling decisions made pursuant to those laws, envisioned by the majority. In light of the specific findings set out in the CSA with regard to the drug at issue here, it is particularly improper for the court to assume such a function in this case. This is true even though limited religious use of another drug, peyote, has been allowed pursuant to statute, 42 U.S.C. § 1996a, and before that, pursuant to regulation, 21

C.F.R. § 1307.31. Apart from the fact that courts should not direct the nation's drug policy, courts simply lack the institutional competence to craft a set of religious exemptions to the uniform enforcement of those laws. In contrast to the majority's conclusion, RFRA does not compel such an approach.

To the extent that RFRA requires the government to prove a compelling governmental interest and least restrictive means concerning the ban on DMT, see 42 U.S.C. § 2000bb-1(b), the government need turn only to express congressional findings concerning Schedule I drugs. Congress specifically found that these drugs have a high potential for abuse, have no currently accepted medical use, and are not safe for use under any circumstances. 21 U.S.C. § 801(2) ("The illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people."); *id.* § 801a(1) ("The Congress has long recognized the danger involved in the manufacture, distribution, and use of certain psychotropic substances . . . , and has provided strong and effective legislation to control illicit trafficking and to regulate legitimate uses of psychotropic substances in this country."). As to the specific drug at issue here, DMT, Congress has found that it has high potential for abuse and is not safe to consume even under the supervision of medical personnel. *Id.* § 812(b)(1) (setting out findings required for placement of a drug on Schedule I); *id.* § 812(c), sched. I(c)(6) (including DMT, dimethyltryptamine, within Schedule I). These congressional findings speak to a need for uniformity in administration given the serious problem of drug abuse in the United States. *See Smith*, 494 U.S. at 905 (O'Connor,

J., concurring); *United States v. Israel*, 317 F.3d 768, 771 (7th Cir. 2003).

RFRA ought not result in a case-by-case redetermination of whether these findings are correct. Judge McConnell takes the opposite position—that congressional findings and scheduling (indeed Congress scheduled DMT) are not enough—stating "[s]uch generalized statements are of very limited utility in evaluating the specific dangers of *this* substance under *these* circumstances, because the dangers associated with a substance may vary considerably from context to context." Opinion of McConnell, J., at 25. Judge McConnell's opinion suffers from two serious defects.

First, the opinion is simply wrong in asserting that the findings in the CSA are too generalized to have any utility in determining whether the use of DMT in a religious setting is dangerous to the health of UDV practitioners. On this point, Congress could not have been more clear. DMT has a high potential for abuse and is not safe to consume *under any circumstances, even including under the supervision of medical personnel.* 21 U.S.C. § 812(b)(1), (c), sched. I(c)(6).

Second, under the approach advocated by Judge McConnell, whether this court is talking about drinking *hoasca* tea (ingesting DMT), smoking marijuana, or shooting heroin (Judge McConnell's example), the government will be required to investigate religious use and determine whether the health risks or possibility of diversion would outweigh free exercise concerns. Such a reading of RFRA is difficult to reconcile with RFRA's purpose of merely reviving the pre-*Smith* compelling interest test. 42 U.S.C. § 2000bb(b)(1). Congress viewed that test as applied in prior federal rulings as "a workable test for striking sensible balances between

religious liberty and competing prior governmental interests." *Id.* § 2000bb(a)(5). Employing that test, courts routinely rejected religious exemptions from laws regulating controlled substances. *See United States v. Greene*, 892 F.2d 453, 456-57 (6th Cir. 1989); *Olsen v. DEA*, 878 F.2d 1458, 1462-63 (D.C. Cir. 1989); *Olsen v. Iowa*, 808 F.2d 652, 653 (8th Cir. 1986); *United States v. Rush*, 738 F.2d 497, 512-13 (1st Cir. 1984); *United States* v. *Middleton*, 690 F.2d 820, 824 (11th Cir. 1982). They have continued to do so with RFRA. *See Israel*, 317 F.3d at 772; *United States* v. *Brown*, No. 95-1616, 1995 WL 732803, at *2 (8th Cir. Dec. 12, 1995) (per curiam); *United States v. Jefferson*, 175 F. Supp. 2d 1123, 1131 (N.D. Ind. 2001). Though these cases involve marijuana, the same result should obtain in this case.[6]

Judge McConnell's view of how RFRA operates seems to overlook events leading up to the passage of RFRA. It is certainly true, as Judge McConnell notes, that RFRA was passed in response to the Supreme

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[6] Judge McConnell asserts that these precedents provide no insight into the proper result in this case because the use of DMT (presumably only that DMT consumed in the form of *hoasca*) is not in widespread use and its sacramental use is "tightly circumscribed." Opinion of McConnell, J., at 21-22. Judge McConnell's view of religious freedom under RFRA is novel and problematic. Under his view, small religious groups are free to use "sacramental drugs," as long as those "sacramental drugs" are esoteric and are not used too frequently. Once the religious group becomes too successful at attracting adherents, its chosen "sacramental drug" becomes popular with the public at large, or it decides that its sacrament must be consumed too frequently, the government's interest becomes paramount. Unfortunately, he cites nothing from the legislative history of RFRA or from pre-*Smith* law to support the notion that the government has a lesser interest in regulating the sacramental drug use of small religious groups than it does in regulating the sacramental drug use of larger religious groups.

Court's decision in *Smith* and that *Smith* did happen to involve the sacramental use of peyote. Opinion of McConnell, J., at 21 ("[T]he impetus for enactment of RFRA was the Supreme Court's decision in a case involving the sacramental use of a controlled substance."). Judge McConnell is wrong to imply, however, that Congress intended to alter the ultimate outcome of that case (states may, consistent with the constitution, prohibit all uses, both religious and non-religious, of peyote), as opposed to altering the analytical model set out in that case (no right in the Free Exercise Clause to avoid neutral laws of general application). Opinion of McConnell, J., at 21-23. A review of the findings accompanying RFRA makes clear that Congress was concerned with the latter, not the former.[7] The procedural

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[7] The Congressional findings accompanying RFRA provide as follows:

The Congress finds that—

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

history preceding the enactment of RFRA does not support Judge McConnell's assertion that this court is free to ignore the congressional findings in the CSA in resolving UDV's RFRA claim.

Equally unconvincing is Judge McConnell's attempt to minimize the government's interest in the uniform enforcement of the CSA. Unlike compulsory education for an additional two years, the interest in enforcement of the nation's drug laws as prescribed by Congress is one of the highest order. *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) ("The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."). It directly affects the health and safety of American citizens. Unlike the protection of bald and golden eagle populations, the regulation of controlled substances can mean the difference between human life and death, and a court should not be second-guessing legislative and administrative determinations concerning drug scheduling based upon the record we have in this case. *See United States v. Szycher*, 585 F.2d 443, 444-45 (10th Cir. 1978); *see also Touby v. United States*, 500 U.S. 160, 162-163 (1991) (discussing time-consuming procedural requirements involved in drug scheduling). For these reasons, Judge McConnell's reliance on *Yoder* and *Hardman* is simply misplaced. Opinion of McConnell, J., at 23-24, 44-45.

Judge McConnell is likewise wrong to assert that the Attorney General has the raw power to grant religious exemptions from the Controlled Substances Act under the guise that it "is consistent with public health and

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42 U.S.C. § 2000bb(a).

safety." 21 U.S.C. § 822(d) (waiving registration requirements for certain manufacturers, distributors and dispensers if consistent with public health and safety); *Olsen*, 878 F.2d at 1466 app. (DEA Final Order) ("There is no mechanism for an exemption to scheduling for religious purposes."). The government's regulatory exemption for peyote, 21 C.F.R. § 1307.31, later enacted by statute, 42 U.S.C. § 1996a, was at all times a product of congressional will. *See Rush*, 738 F.2d at 513 (noting the "*sui generis* legal status of the American Indians"). The panel opinion recognized this when it rejected an equal protection argument that because the Native American Church's use of peyote is protected, so too should be the use of *hoasca*. *See O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft*, 342 F.3d 1170, 1186 n.4 (10th Cir. 2003). The panel relied upon *Peyote Way Church of God v. Thornburgh*, 922 F.2d 1210, 1216 (5th Cir. 1991), which held that an exemption for the Native American Church members to use peyote was rationally related to the government's trust responsibility to preserve Native American culture. To read the exemption for the Native American Church as an indication that Congress and the Executive have not precluded "a particularized assessment of the risks involved in specific sacramental use" of controlled substances, Opinion of McConnell, J., at 25-27, proves too much—the concurring opinion can point to no other controlled substance receiving like treatment.

The CSA envisions careful scheduling of substances. *See* 21 U.S.C. § 811(c) (listing eight factors which Attorney General must consider before adding or removing a substance from schedules); *id.* § 812(b) (findings necessary for adding a substance to a schedule); *id.* § 811(a) (requirement of notice and a hearing before Attorney

General may add or remove a substance from schedule). It also envisions medical and scientific uses of controlled substances in the public interest and consistent with public health and safety; "[n]either manufacturing, distribution or dispensing contemplates the possession of controlled substances for other than legitimate medical or research purposes." *Olsen*, 878 F.2d at 1466 app. (DEA Final Order); *see also* 21 U.S.C. § 823(a)-(b). Finally, the CSA allocates the burden of production in favor of the government: in any proceeding brought by the government under Title 21, the burden of going forward with evidence of any exemption or exception falls on the person claiming its benefit. 21 U.S.C. § 885(a)(1) (government is not required to negative any exemption or exception).

The careful approach of the CSA should be contrasted with that of this court. Although this court recognizes that "the interests of the government as well as the more general public are harmed if the government is enjoined from enforcing the CSA against the general importation and sale of street drugs, or from complying with the treaty," it then characterizes this case as one "about importing and using small quantities of a controlled substance in the structured atmosphere of a bona fide religious ceremony." Opinion of Seymour, J., at 22-23. Can the free exercise of religion under RFRA really turn on whether the adherent has a religious affinity for street drugs or more esoteric ones?[8]

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[8] As noted above, Judge McConnell suggests that it can. According to his opinion, the strength of the government's interest in avoiding diversion of a controlled substance and enforcing the CSA will vary under RFRA depending on how esoteric the drug is, how often the drug is taken as a sacrament, the size of the religious group, and whether the drug is consumed in a traditional or non-

In light of the congressional purpose behind RFRA of reinstating the pre-*Smith* compelling interest test, 42 U.S.C. § 2000bb(b)(1), the routine rejection of religious exemptions from drug laws in the pre-*Smith* era, and the congressional findings undergirding the placement of DMT among the most dangerous and addictive of drugs (i.e., Schedule I substances), UDV has failed to demonstrate that it is likely to succeed on the merits of its claim that RFRA entitles it to freely import and dispense *hoasca*.

2. *United Nations Convention on Psychotropic Substances*

The United States argues convincingly that a preliminary injunction requiring it to violate the Convention

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traditional fashion. Opinion of McConnell, J., at 21-22, 27-28. With regard to this particular case, Judge McConnell presumes that in proscribing DMT Congress was only concerned with it being taken intravenously or being inhaled, not with oral ingestion. *Id.* at 27. No evidence supports this. In *United States v. Green*, 548 F.2d 1261 (6th Cir. 1977), a DEA chemist qualified as an expert witness testified to the hallucinogenic effects of DMT and its similarity in this respect to LSD, its dangerousness, and potential for abuse. *Id.* at 1269; *see also People v. Saunders*, 543 N.E.2d 1078, 1080 (Ill. App. Ct. 1989) (psychiatrist testimony that DMT is an hallucinogen and similar to LSD). Though the court reversed the conspiracy to manufacture convictions in *Green* because it found that such testimony had minimal probative value and was prejudicial concerning the conspiracy charge, the court noted that "[s]uch facts may be highly relevant is assessing the need for controlling the drug." *Green*, 548 F.2d at 1270. Other DMT prosecutions may be found in *United States v. Ling*, 581 F.2d 1118 (4th Cir. 1978); *United States v. Noreikis*, 481 F.2d 1177 (7th Cir. 1973); *United States v. Moore*, 452 F.2d 569 (6th Cir. 1971). It is also noteworthy that New Mexico proscribes possession and possession with intent to distribute DMT (dimethyltryptamine). *See* N.M. Stat. Ann. §§ 30-31-6(C)(6), 30-31-20(B), 30-31-23(D).

could seriously impede its ability to gain the cooperation of other nations in controlling the international flow of illegal drugs. *See* 21 U.S.C. § 801a(1) ("Abuse of psychotropic substances has become a phenomenon common to many countries . . . and is not confined to national borders. It is, therefore, essential that the United States cooperate with other nations in establishing effective controls over international traffic in such substances.").[9] The district court erroneously concluded that the Convention did not cover *hoasca*. Judge McConnell does not appear to directly address the merits of the district court's conclusion, instead concluding that the government has failed to carry its burden under RFRA of demonstrating narrow tailoring. Opinion of McConnell, J., at 29-33. Judge Seymour, on the other hand, takes an entirely different tack. In her separate opinion, she asserts that because the Convention includes a provision allowing "signatory

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[9] As was true of the panel majority, Judge Seymour asserts that the Convention "must be read in light of RFRA and the religious use of the controlled substance here." Opinion of Seymour, J., at 24 & n.5 (citing *O Centro Espirita*, 342 F.3d at 1183-84). As noted in the panel dissent, such an assertion could be read for the following two disturbing propositions: (1) the government's interest in complying with its obligations under the Convention is not compelling because these obligations conflict with the government's obligations under RFRA; and (2) because RFRA was enacted after the Convention was ratified, the Convention is nullified to the extent it conflicts with RFRA. *O Centro Espirita*, 342 F.3d at 1191 n.4 (Murphy, J., dissenting). The dissent further explained why both propositions are incorrect as a matter of law. *Id.* Unfortunately, Judge Seymour has carried the panel's error forward, again intimating that the terms of the Convention have somehow been amended by RFRA. For those reasons set out in the panel dissent, Judge Seymour is wrong in asserting that RFRA has displaced or amended the Convention. *Id.*

nations to seek an exemption from the treaty for indigenous plants containing prohibited substances 'traditionally used by certain small, clearly determined groups in magical or religious rites,'" the government's "argument that it will be significantly harmed by a preliminary injunction temporarily restraining it from enforcing the treaty against the UDV does not ring entirely true." Opinion of Seymour, J., at 25. The district court, Judge McConnell, and Judge Seymour are all incorrect.

For those reasons set out in the panel dissent, *hoasca* is a preparation containing a Schedule I substance covered by the Convention. *O Centro Espirita*, 342 F.3d at 1192-93 (Murphy, J., dissenting). Article 7 of the Convention obligates signatory nations to prohibit all uses of Schedule I substances and to prohibit the import and export of those substances. Convention, *supra*, at 1, art. 7, 32 U.S.T. 543. The congressional findings in 21 U.S.C. § 801a(1) make clear that international cooperation and compliance with the Convention are essential in providing effective control over the cross-border flow of such substances. In addition, the record contains the declaration of Robert E. Dalton, a State Department lawyer for the Treaty Affairs Office. Dalton's declaration asserts that the need to avoid a violation of the Convention is compelling and that a violation of the Convention would undermine the United States' role in curtailing illicit drug trafficking. It appears that the Dalton declaration is unopposed. In light of the plain meaning of the Convention, the congressional findings on the importance of cooperation, and the Dalton declaration, UDV has not demonstrated a substantial likelihood that it will prevail on the merits of its RFRA claim.

In his separate opinion, Judge McConnell asserts that (1) the government deprived this court of "evidence" necessary to interpret the Convention and (2) the government failed to demonstrate that strictly prohibiting the import and consumption of *hoasca* is the least restrictive means of furthering its interest in complying with the Convention. Opinion of McConnell, J., at 29, 30-33. Judge McConnell's assertions are flawed in several respects.

First and foremost, the interpretation of the Convention is a question of law. *See, e.g.*, *Ehrlich v. Am. Airlines, Inc.*, 360 F.3d 366, 370 (2d Cir. 2004) (holding that proper interpretation of an international treaty is a question of law subject to de novo review); *United States v. Garrido-Santana*, 360 F.3d 565, 576-77 (6th Cir. 2004) (same); *United States v. Al-Hamdi*, 356 F.3d 564, 569 (4th Cir. 2004) (same); *Smythe v. United States Parole Comm'n*, 312 F.3d 383, 385 (8th Cir. 2002) (same). Here, the district court unequivocally concluded that the Convention did not apply to *hoasca*. For those reasons set out in the panel dissent, the district court's legal conclusion is erroneous. *O Centro Espirita*, 342 F.3d at 1192-93 (Murphy, J., dissenting). That the district court did not hold a hearing on this question, does not foreclose this court from recognizing the district court's legal error. When interpreting a treaty this court must "first look to its terms to determine its meaning." *United States v. Alvarez-Machain*, 504 U.S. 655, 663 (1992). As set out in the panel dissent, and as elaborated supra, the plain language of the Convention makes clear that all signatories must prohibit the international trafficking of *hoasca*.

Based on its erroneous legal conclusion that the Convention did not apply to *hoasca*, the district court

precluded the government from presenting evidence regarding the Convention at the evidentiary hearing. In a letter to the parties, the district court indicated as follows: "I have reviewed the parties' briefs on [UDV's] Motion for Preliminary Injunction. I believe that it will be necessary to hold an evidentiary hearing on the following factual issues: 1) the health risks associated with the ceremonial use of *hoasca*; 2) the potential for diversion of *hoasca* to non-ceremonial use. . . ." Of course, as noted above, whether *hoasca* is covered by the Convention is a question of law for the court to decide, not a question of fact like those questions identified by the district court in its letter. Thus, it is strange to assert, as does Judge McConnell, that it would be premature to reach this issue because the district court did not hold an evidentiary hearing on the matter. Opinion of McConnell, J., at 29.

Nor is it altogether accurate to assert that it was the defendants who opposed the introduction of evidence on this question at the hearing. *Id.* Judge McConnell asserts that UDV "attempted to present evidence regarding the interpretation of the Convention by the International Narcotics Control Board [("INCB")], the international enforcing agency, including a letter by the Secretary of the Board stating that hoasca is not controlled under the Convention." *Id.* (emphasis added). Judge McConnell makes it appear that UDV sought to produce multiple items of evidence, only one component of which was a letter from the Secretary of the INCB. In fact, UDV merely sought to question a witness about the contents of Plaintiff's Exhibit 54, a letter from the Secretary of the INCB. That letter had already been admitted into evidence and used by both UDV and the government in questioning witnesses regarding the

efficacy of the control measures for Schedule I and II drugs under the Convention. Furthermore, as noted by the government below, there are serious questions as to the relevance of the Secretary's opinion regarding whether *hoasca* is covered by the Convention.

Judge McConnell further asserts that based on a narrow objection by the United States, the district court excluded the evidence, depriving this court of "interpretive history" necessary to a resolution of this appeal.[10] It is far from clear, however, that Plaintiff's Exhibit 54 is as important as Judge McConnell would assume, since neither party saw fit to include it in the record on appeal. Nor is it accurate to assert that the sole basis of the government's objection to the line of questioning was that the district court had not asked the parties to present evidence on the issue. Opinion of McConnell, J., at 29. Instead, the government objected on multiple grounds: (1) the questions were beyond the scope of redirect examination; (2) the letter was legally irrelevant; (3) the district court had previously informed the parties that no evidence would be taken on the Convention; and, most importantly, (4) whether *hoasca* is covered by the Convention was a legal

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[10] According to Judge McConnell,

> The government objected on the ground that "We are now introducing testimony about whether or not ayahuasca is controlled under the International Convention. That is not one of the issues in this hearing." After discussion, the district court forbade the questioning on the subject, and plaintiffs were unable to introduce evidence on the interpretation of the Convention by the Board. For this Court to attempt to interpret a complex treaty on the basis of its "plain language," without the benefit of its interpretive history, would be premature."

Opinion of McConnell, J., at 29 (record citation omitted).

question for the court to decide.[11] Taken in context, then, it is not appropriate to hold the government responsible, as does Judge McConnell, for the district court's failure to hold a hearing on whether compliance with the Convention is a compelling governmental interest. *Id.*

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[11] During the discussion on whether the questioning should be allowed, counsel for the government stated as follows:

> Objection, Your Honor. We are now introducing testimony about whether or not ayahuasca is controlled under the International Convention. That is not one of the issue in this hearing.
>
> . . . .
>
> Your Honor, the person who introduced that exhibit was plaintiffs' counsel, who introduced it for the purpose of talking about the effectiveness of controls. I also was talking about the effectiveness of Schedule I and II controls. I did not talk about the applicability of the treaty to ayahuasca. That is not one of the issues here. That is a legal issue, and that is up to Your Honor to decide. . . .
>
> . . . .
>
> Your Honor, we did not just now talk about which substances were controlled in the Convention. When I went through this report, it was to rebut statements [plaintiffs' counsel] made from the report yesterday about the effectiveness of the controls. That is the only reason.
>
> The reason why we should not be talking about this today is because it is not an opinion of the INCB. The secretary of the board is not a voting member. The government does not agree or accept that the INCB doesn't control ayahuasca under the Convention. The INCB does not have the authority to determine what is controlled under the Convention. This is an entirely separate issue. It's a legal issue for another day. And this does not relate to diversion or anything I talked about just now.

Nor is it appropriate to fault the government for failing to demonstrate that strictly prohibiting the importation and consumption of DMT, in the form of *hoasca*, is the least restrictive way to further the government's interest in complying with the Convention. Opinion of McConnell, J., at 30. The problem, of course, is that the district court short-circuited the government's ability to present evidence on this particular question when it concluded that the Convention did not apply to hoasca. Under these circumstances, it seems strange to punish the government for this purported evidentiary deficiency. As we have it, the Dalton declaration is the only evidence in the record on the question and is uncontradicted. With the record in this state, UDV has failed to demonstrate a substantial likelihood of success on the merits.[12]

In response, Judge McConnell envisions an elaborate process whereby, to demonstrate narrow tailoring, the government is obligated to request that DMT be removed from the schedule of drugs covered by the Convention. Opinion of McConnell, J., at 30-31. That is, until the government seeks to have DMT removed from coverage by the Convention, it cannot demonstrate that "strict" prohibitions against the import of DMT are the least restrictive means of advancing its interest in complying with the Convention. It is worth noting at the outset that this argument is not advanced on appeal by

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[12] Even if Judge McConnell were correct that the record is too truncated to reach a decision on whether the government has advanced a compelling interest in complying with the Convention and that prohibition on the import and consumption of *hoasca* is the most narrowly tailored means of advancing that compelling interest, however, the more appropriate course of action would be to remand to the district court for further development of the record.

UDV. In any event, Congress has specifically found that DMT is a highly dangerous and addictive substance. It is difficult to see how asking that DMT be removed from the schedule of drugs covered by the Convention advances the government's interests in any way. To the extent that Judge McConnell is implying that the government could seek an exemption allowing importation into and consumption of DMT in the United States, whether or not that DMT came in the form of *hoasca*, while the remaining signatories remain bound by the terms of the Convention to prevent international trafficking in DMT, his assertion finds absolutely no support in the language of Article 2. There is simply nothing in that particular Article allowing signatory nations to pick and choose which of the Scheduled drugs they will criminalize. It is certainly true that signatory nations can object to the scheduling of new psychotropic drugs and can ask that drugs already scheduled be reclassified. Opinion of McConnell, J., 30-31. Those provisions do not, however, allow for a single nation opt-out; instead, they establish the schedule of drugs that all signatory nations will be obligated to criminalize. It is incongruous to obligate the government to seek to remove DMT from the coverage of the Convention in order to demonstrate that its efforts to restrict the importation and consumption of DMT are the least restrictive means of complying with the Convention.

Judge Seymour does not endorse the district court's conclusion that the Convention does not apply to *hoasca*. Instead, she asserts that the availability of the exemption in Article 32 of the Convention demonstrates that no significant harm will flow to the government from the injunction. Opinion of Seymour, J., at 24-25; *see also* Opinion of McConnell, J., at 31-32 (asserting

that the failure of the government to seek a reservation under Article 32(4) on behalf of UDV demonstrates the government failed to prove that the strict prohibition against the importation and consumption of *hoasca* is the least restrictive means of furthering its interest in complying with the Convention). What Judges Seymour and McConnell fail to acknowledge, however, is that the exemption set out in Article 32(4) allows signatory nations to make a reservation as to all of the provisions of Article 7, *except for the provisions of Article 7 prohibiting the international trafficking of psychotropic substances.* Article 32(4) specifically provides as follows:

> A State *on whose territory* there are plants growing wild which contain psychotropic substances from among those in Schedule I and which are traditionally used by certain small, clearly determined groups in magical or religious rites, may, at the time of signature, ratification or accession, make reservations concerning these plants, in respect of the provisions of article 7, *except for the provisions relating to international trade.*

Convention, *supra*, at 1, art. 32(4), 32 U.S.T. 543 (emphasis added). In light of this very specific language, it is not possible to treat the exemption set out in Article 32 as diminishing the significant injury to the government flowing from an injunction mandating that the government allow the importation of *hoasca*.

**B. Balance of Harms and Public Interest**

For those reasons set out above, UDV has not demonstrated a substantial likelihood of success on the merits of its RFRA claim. This is especially true in light of the heightened burden on UDV to demonstrate

its entitlement to a preliminary injunction that upends the status quo. Independent of the question of likelihood of success on the merits, however, UDV has not demonstrated that its harm outweighs the harm flowing to the government as a result of the preliminary injunction or that the preliminary injunction is not adverse to the public interest.

RFRA provides that once a person proves that a law substantially burdens the exercise of religion, the government has the burden of going forward and of persuasion in proving that the law furthers a compelling governmental interest and that the law as applied is the least restrictive means of furthering that compelling governmental interest. 42 U.S.C. §§ 2000bb-1(a), 2000bb-1(b)(1)-(2), 2000bb-2(3). Though this is a demanding test, *see City of Boerne v. Flores*, 521 U.S. 507, 534 (1997), it seems particularly appropriate to insist that a movant meet all elements of the preliminary injunction test because RFRA goes beyond the protections offered by the First Amendment. *See Kikumura v. Hurley*, 242 F.3d 950, 955, 962 (10th Cir. 2001) (requiring consideration of all preliminary injunction elements with RFRA claim). In other words, RFRA is not the First Amendment and UDV has no valid claim that its First Amendment rights are being violated given that the CSA is a neutral law of general applicability. *See Smith*, 494 U.S. at 885; *United States v. Meyers*, 95 F.3d 1475, 1481 (10th Cir. 1996). Given evenly balanced evidence concerning the health risks of DMT usage and its potential diversion, UDV cannot satisfy its burden of showing that its injury outweighs any injury to the government and that an injunction would not be adverse to the public interest.

1. *Controlled Substances Act*

First and foremost, as set out above, Congress has specifically found that the importation and consumption of controlled substances is adverse to the public interest. 21 U.S.C. §§ 801(2), 801a(1). Congress has specifically found that the drug at issue here, DMT, has high potential for abuse and is not safe to consume even under the supervision of medical personnel. *Id.* § 812(b)(1), (c), sched. I(c)(6).[13]

Against this backdrop, the district court found that the evidence was in equipoise as to the risk of diversion of *hoasca* to non-religious purposes and the danger of health complications flowing from *hoasca* consumption

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[13] Judge Seymour appears to assert that it is improper to rely on these congressional findings in light of the passage of RFRA. Opinion of Seymour, J., at 27 n.8 ("Judge Murphy relies heavily on Congress' specific findings that the importation and consumption of controlled substances are adverse to the public interest . . . while totally ignoring the immediate and strong reaction Congress had to the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990)."). Judge Seymour's assertion is flawed. As the congressional findings accompanying RFRA make clear, what Congress found offensive about Smith was its abandonment of the compelling interest test with regard to laws neutral to religion. 42 U.S.C. § 2000bb(a). None of the findings in § 2000bb(a), or any other portion of RFRA, indicate that the interests protected by the CSA are not compelling. In fact, there is no mention at all of the CSA in § 2000bb(a). Judge Seymour has simply failed to explain how the findings set out in § 2000bb(a) minimize the magnitude of the interests identified by Congress in enacting the CSA. Because RFRA requires that government conduct which burdens religion be in furtherance of a compelling governmental interest, *id.* § 2000bb-1(b)(1), and because the congressional findings accompanying the CSA bear on the question whether the governmental interests at issue in this case are compelling, the congressional findings accompanying the CSA are highly relevant.

by UDV members. As noted above, both Judge Seymour and Judge McConnell erroneously rely on this finding to conclude that the United States has not carried its burden of demonstrating that the restrictions in the CSA against the importation and consumption of *hoasca* further the United States' compelling interests and that, concomitantly, UDV is substantially likely to prevail on the merits of its RFRA claim. Opinion of Seymour, J., at 21; Opinion of McConnell, J., at 17-18. The United States, however, has no such burden at the third and fourth steps of the preliminary injunction analysis. At these stages, it is UDV that must demonstrate the requested preliminary injunction is not adverse to the public interest and its harm outweighs any harm to the government. Furthermore, because the preliminary injunction UDV is requesting would upset the status quo, it must show that the exigencies of the case entitle it to this extraordinary interim relief and that the balance of harms favors the issuance of an otherwise disfavored interim remedy. In light of the congressional findings noted above and the equipoised nature of the parties' evidentiary submissions, UDV has not met its burden.[14]

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[14] Judge Seymour seems to take comfort in the fact that the preliminary injunction only temporarily precludes the government from enforcing the CSA. *See* Opinion of Seymour, J., at 24. As noted above, however, Congress has specifically found that the consumption of DMT is unsafe even when consumed under medical supervision and that the drug has a high potential for abuse. *See* 21 U.S.C. § 812(b)(1). UDV could not muster sufficient evidence to demonstrate that consumption of DMT is safe or that there is no risk of diversion. Although it is true that the preliminary injunction could be quickly lifted should the United States prevail on the merits, such a course would not remediate any harm that might occur to the members of UDV or the general citizenry from

The United States suffers irreparable injury when it is enjoined from enforcing its criminal laws. *See New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (Rehnquist, Circuit Justice 1977). This injury to the United States, which when coupled with UDV's failure of proof on the questions of diversion and danger to UDV members prevents UDV from meeting its burden under the third and fourth preliminary injunction factors, is exacerbated by the burdensome and constant official supervision and oversight of UDV's handling and use of *hoasca* affirmatively required by the injunction in this case. The district court's preliminary injunction is eleven pages long and contains thirty-six paragraphs; it modifies or enjoins enforcement of a staggering number of regulations implementing the CSA, with the result that the United States must actually set about to aid UDV in the importation of an unlimited supply of *hoasca*.[15] UDV has not carried its burden of demonstrating that its injury, although admittedly irreparable, sufficiently outweighs the harm

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diverted *hoasca* while the preliminary injunction was in effect. Judge Seymour's approach thus seems to wholly discount those risks that inhere in the preliminary injunction.

[15] *See, e.g.*, Preliminary Injunction para. 13 (giving UDV right to refuse to allow inspections of any items, pending a determination by the district court, if UDV concludes such an inspection would violate its right to freedom of association); *id.* para. 15 (directing United States and UDV to "arrive at a mutually acceptable means of disposal of any *hoasca* that must be disposed of"); *id.* para. 24 (setting out time frames within which United States must conduct inspections); *id.* para. 25 (requiring United States to expedite UDV applications to import and distribute hoasca); *id.* para. 29 (seriously limiting circumstances under which United States can revoke UDV's registration to import and distribute *hoasca*); *id.* para. 35 (requiring United States to designate person or small group of persons to act as liaison with UDV).

to the government so as to warrant interim relief that alters the status quo pending a determination of the merits.[16]

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[16] In concluding that the injunction in this case is prohibitory rather than mandatory, Judge Seymour makes much of the fact that many of the provisions in the preliminary injunction were added at the government's insistence. Opinion of Seymour, J., at 16-17. This, however, over-simplifies the procedural history and thereby belies the actual process by which the burdensome provisions found their way into the district court's preliminary injunction. After concluding that UDV was entitled to an injunction on its RFRA claim, the district court directed the parties to submit proposed forms of a preliminary injunction. When the parties were unable to agree as to the form of the preliminary injunction, UDV submitted a memorandum on the question. In that memorandum, UDV proposed a limited regulatory scheme different and independent from the regulations set out in the Code of Federal Regulations governing Schedule I substances. In response, the United States asserted that UDV remained bound by applicable regulations relating to the lawful importation and distribution of Schedule I substances *because UDV had never lodged a proper legal challenge to those regulations*. The government thus asserted that although UDV had challenged restrictions on its use of *hoasca*, it had not challenged generally applicable regulations regarding the lawful *importation*, *distribution*, and *possession* of Schedule I substances. Accordingly, the form of the preliminary injunction submitted by the government required UDV to comply with all applicable statutes and regulations *to which UDV had failed to lodge a legal challenge*. Notably, no provision in the government's proposed preliminary injunction required the government to engage in a cooperative enterprise with UDV by setting strict time limits within which the government was obliged to act, required the government to negotiate with UDV over disposal of *hoasca*, or required the government to designate a liaison to deal directly with UDV. Accordingly, it is simply wrong to assert that it was the government who requested the provisions in the preliminary injunction that it now challenges as burdensome. Furthermore, it is wrong to assert that the preliminary injunction entered

Unfortunately, Judge Seymour's separate opinion could be read as shifting the burden to the government to prove that its harm flowing from an injunction prohibiting enforcement of the CSA outweighs the harm to UDV and that the preliminary injunction is not adverse to the public interest. Opinion of Seymour, J., at 24 ("As the UDV established to the district court's satisfaction, neither of the potential harms asserted by the government are more likely than not to occur. Thus, the balance is between actual irreparable harm to plaintiff and potential harm to the government which does not even rise to the level of a preponderance of the evidence."). The problem with such an approach is that even when a requested preliminary injunction does not alter the status quo, the movant has the burden of demonstrating, clearly and unequivocally, that it is entitled to interim relief that is always extraordinary. *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1260-61 (10th Cir. 2004). Because

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by the district court is wholly prohibitory. The provisions identified above are clearly mandatory in that they require the government to take action outside of the normally applicable regulatory framework for the lawful importation, distribution, and possession of a substance containing DMT. As a consequence, the preliminary injunction constructs a customized regulatory scheme for UDV that differs from the regulatory scheme otherwise applicable to the lawful importation, distribution, and possession of Schedule I substances. Accordingly, Judge Seymour is wrong in discounting the magnitude of the harm to the government from the district court's eleven-page, thirty-six-paragraph preliminary injunction. Although the preliminary injunction at issue here is subject to a heightened standard because it alters the status quo, thus obviating the need to definitively determine whether the injunction as a whole is mandatory or prohibitory, Judge Seymour certainly errs in discounting the burdens imposed on the government as a result of the district court's preliminary injunction.

this particular preliminary injunction does alter the status quo, UDV must make an even more rigorous showing, as set out above, of its entitlement to interim relief. *See supra* at 9-10. With this in mind, it must be noted that it is UDV that failed to show by a preponderance of the evidence there was no risk of diversion and no risk to the health of UDV members. The government has no such burden of proof at the third and fourth stages of the preliminary injunction analysis. To conclude that UDV satisfied its burden defies the record and the district court's findings that the evidence is in equipoise.

Judge Seymour's discussion of the balancing of the harms flowing from enjoining enforcement of the CSA is similarly unconvincing. UDV would certainly suffer an irreparable harm, assuming of course that it is likely to succeed on the merits of its RFRA claim. On the other hand, the magnitude of the risk of harm to the government is unquestionably substantial. Although the harm identified by the government is a risk of diversion and a risk of adverse health consequences to members of UDV or to a member of the public who obtains diverted hoasca, if the risk comes to fruition the consequences could be deadly. As explained above, UDV failed to demonstrate that there is no risk of diversion or of adverse health consequences to UDV members. As the district court's findings demonstrate, it is just as likely as not that *hoasca* will be diverted and that members of UDV and the public will suffer adverse health consequences. *Cf.* 21 U.S.C. § 812(b)(1), (c), sched. I(c)(6) (finding that DMT is unsafe to consume even under medical supervision). Both Judge Seymour and Judge McConnell seriously undervalue the magnitude of the risks identified by the gov-

ernment in concluding that UDV's actual harm outweighs the risks of harm identified by the government.

At its base, the concurring opinion of Judge McConnell would convert RFRA into a 900-pound preliminary injunction gorilla. According to Judge McConnell, the third and fourth preliminary injunction factors have no real play when RFRA is involved. Opinion of McConnell, J., at 36-37 ("When the government fails to demonstrate its compelling interest in burdening a constitutional right, courts routinely find that, in the absence of a compelling justification for interference, the balance of harms and public interest also favor protecting the moving party's burdened rights."). Thus, according to Judge McConnell, once a party demonstrates a substantial likelihood of success on the merits in a RFRA case, the inquiry is complete. *Id.* Other than simply noting that Congress passed RFRA only to restore the compelling interest test from *Sherbert v. Verner*, 374 U.S. 398 (1963), Judge McConnell offers no real support for his implicit proposition that RFRA renders irrelevant each of the remaining preliminary injunction factors.[17] Judge McConnell thus rewrites RFRA so that it would now legislatively overrule decades of preliminary injunction jurisprudence, something RFRA does not do expressly.

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[17] Judge McConnell does cite to a number of cases involving the deprivation of a constitutional right. Opinion of McConnell, J., at 37-38. As noted above, both Judges McConnell and Seymour seem to forget that the right at issue in this case is based on a congressional enactment, not the Constitution. Furthermore, as noted at length above, RFRA must be read in light of its historical context. RFRA merely restored the law to its pre-*Smith* state, a state of law under which courts routinely rejected religious exemptions from generally applicable drug laws.

Equally unconvincing is Judge McConnell's assertion that equitable considerations that might not carry the day for the government at the likelihood-of-success-on-the-merits stage are rendered irrelevant by RFRA at the balancing-of-harms and public-interest stages. Opinion of McConnell, J., at 36 ("[T]he dissent attempts to make an end run around RFRA's reinstatement of strict scrutiny by repackaging all of the arguments that would be relevant to the merits (where the presumption of invalidity would clearly apply) as arguments about the equities (where it is disregarded)."). The preliminary injunction is, after all, an equitable remedy. Even where a movant demonstrates that it is substantially likely to prevail on the merits, a showing that UDV has failed to make, there may very well be equitable considerations counseling against the granting of extraordinary relief prior to a final determination on the merits. This is just such a case. Without regard to whether UDV is substantially likely to prevail on the merits, the evidence adduced before the district court raises such serious questions about the adverse health effects of *hoasca*, both as to UDV members and the public at large, and about the consequences of forced non-compliance with the Convention that interim equitable relief is not appropriate in this case.

Nor does the Supreme Court's recent decision in *Ashcroft v. ACLU*, 124 S. Ct. 2783 (2004), support Judge McConnell's assertion that equitable considerations are irrelevant under RFRA, once a movant has demonstrated a substantial likelihood of success on the merits. *See* Opinion of McConnell, J., at 38-40. Judge McConnell cites the following passage from *Ashcroft* in support of his proposition:

> As mentioned above, there is a serious gap in the evidence as to the effectiveness of filtering software. . . . . For us to assume, without proof, that filters are less effective than COPA would usurp the District Court's factfinding role. By allowing the preliminary injunction to stand and remanding for trial, we require the Government to shoulder its full constitutional burden of proof respecting the less restrictive alternative argument, rather than excuse it from doing so.

Opinion of McConnell, J., at 39-40 (quoting *Ashcroft*, 124 S. Ct. at 2794). Contrary to Judge McConnell's assertion, this passage simply does not relate in any fashion to the equitable process of balancing the competing harms or examining how a requested injunction would affect the public interest that occurs at the third and fourth stages of the preliminary injunction inquiry. Instead, it relates only to the question whether the movants in that case were likely to prevail on the merits. *See Ashcroft*, 124 S. Ct. at 2791-92 ("As the Government bears the burden of proof on the ultimate question of COPA's constitutionality, respondents must be deemed likely to prevail unless the Government has shown that respondents' proposed less restrictive alternatives are less effective than COPA.").

To the extent that there is any meaningful discussion in *Ashcroft* of the particular issue before this court,[18] *Ashcroft* supports the approach set out in this opinion. In concluding that the preliminary injunction should

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[18] That is, whether equitable considerations might occasionally preclude the grant of a preliminary injunction even though a movant has demonstrated a likelihood of success on the merits.

stand under the particular circumstances of that case, the *Ashcroft* Court noted as follows:

> [T]he potential harms from reversing the injunction outweigh those of leaving it in place by mistake. Where a prosecution is a likely possibility, yet only an affirmative defense is available, speakers may self-censor rather than risk the perils of trial. There is a potential for extraordinary harm and a serious chill upon protected speech. The harm done from letting the injunction stand pending a trial on the merits, in contrast, will not be extensive. No prosecutions have yet been undertaken under the law, so none will be disrupted if the injunction stands. Further, if the injunction is upheld, the Government in the interim can enforce obscenity laws already on the books.

*Ashcroft*, 124 S. Ct. at 2794 (citation omitted). This passage indicates that "practical" considerations, including considerations that might not carry the day at the likelihood-of-success-on-the-merits stage, are nevertheless relevant when a court is undertaking a weighing of the equities. *Id.* In this case, those practical considerations most assuredly counsel against granting interim relief to UDV. The record clearly indicates, and the district court found, that it is just as likely as not that UDV members will suffer adverse health consequences as a result of the consumption of *hoasca* and that *hoasca* will be diverted to the general public. Furthermore, with the preliminary injunction in place, the government is left with no alternative avenues to further the important public safety policies underlying the CSA. This is in stark contrast to the situation in *Ashcroft*, wherein the government could "in the interim [continue to] enforce obscenity laws already on the

books." *Id.* For those reasons set out above, this is clearly one of those cases where equitable considerations weigh heavily against the entry of a preliminary injunction, even assuming UDV has demonstrated a substantial likelihood of prevailing on the merits.

2. *United Nations Convention on Psychotropic Substances*

As noted above, a preliminary injunction requiring the United States to violate the Convention could seriously impede the government's ability to gain the cooperation of other nations in controlling the international flow of illegal drugs. 21 U.S.C. § 801a(1) ("Abuse of psychotropic substances has become a phenomenon common to many countries . . . and is not confined to national borders. It is, therefore, essential that the United States cooperate with other nations in establishing effective controls over international traffic in such substances."). Furthermore, the only evidence in the record on this question, the Dalton declaration, indicates the need to avoid a violation that would undermine the United States' role in curtailing illicit drug trafficking.

Without regard to whether the declaration and congressional findings are sufficient to carry the government's burden of demonstrating that absolute compliance with the Convention is the least restrictive means of advancing the government's compelling interest, the declaration, taken together with the congressional findings, certainly bears on the question of harm to the United States and the adversity of the preliminary injunction to the public interest. These matters were not even addressed by the district court. In light of the declaration, the congressional findings, and the extant status quo, UDV has simply not carried its burden of

demonstrating that its interest in the use of sacramental *hoasca* pending the resolution of the merits of its complaint outweighs the harm resulting to the United States from a court order mandating that it violate the Convention. Nor has UDV shown that such an injunction is not adverse to the public interest.

**III.**

The court correctly reaffirms the central holding in *SCFC ILC* that when a movant is seeking one of the three historically disfavored types of preliminary injunctions, the movant must satisfy a higher burden. I, therefore, join parts I, II, and III.A of the *per curiam* opinion.

For those reasons set out above, UDV has failed to make the strong showing necessary to demonstrate its entitlement to a judicially ordered alteration of the status quo pending the resolution of the merits of this case. First, UDV has not demonstrated a substantial likelihood of success on the merits. The government's assertion that the ban on the consumption of DMT/*hoasca* is necessary to protect the health of UDV members and to prevent diversion of a Schedule I psychotropic drug to the general population is fully supported by the congressional findings set out in the CSA. 21 U.S.C. §§ 801(2), 801a(1), 812(b)(1), 812(c), sched. I(c)(6). These same congressional findings also demonstrate the need for uniformity in administration of the drug laws. *See Smith*, 494 U.S. at 905-06 (O'Connor, J., concurring); *Israel*, 317 F.3d at 771. At the same time, it is clear that Congress enacted RFRA to restore the pre-*Smith* compelling interest test. 42 U.S.C. § 2000bb(a). Prior to *Smith*, courts routinely rejected religious exemptions from laws regulating controlled substances. *See supra* at 19-20 (setting out pre-and

post-RFRA cases rejecting religious exemptions from neutrally applicable drug laws). There is simply nothing in the legislative history of RFRA to indicate that it was intended to mandate a drug-by-drug, religion-by-religion judicial reexamination of the nation's drug laws. UDV has failed to demonstrate that it is substantially likely to prevail on its claim that RFRA exempts it from the prohibition against the consumption of DMT set out in the CSA. UDV has likewise failed to demonstrate that it is substantially likely to prevail on its RFRA claim, when measured against the government's interest in complying with the Convention. Congress specifically found that international cooperation is necessary to stem the international flow of psychotropic drugs. 21 U.S.C. § 801a(1). The Dalton declaration demonstrates that an injunction forcing the United States into non-compliance with the Convention could undermine the United States' efforts to obtain international cooperation to control the cross-border traffic in illegal drugs. Because UDV has failed to demonstrate a substantial likelihood of success on the merits, it is not entitled to a preliminary injunction.

Even setting aside the question of whether UDV is substantially likely to prevail on the merits, UDV has independently failed to carry its heavy burden of establishing that the balance of harms and the public interest favors the issuance of a preliminary injunction. Setting aside the Convention for the moment and considering these factors only in relation to the CSA, UDV failed to establish entitlement to extraordinary interim relief altering the status quo. The district court found, as part of its analysis of likelihood of success on the merits, that the evidence regarding risk of diversion and harm to members of UDV was virtually

balanced and in equipoise. In other words, the district court found that it is just as likely as not that *hoasca* will be diverted to the general public and that members of UDV will suffer harm from the consumption of *hoasca*. These findings make it clear that UDV failed to muster sufficient evidence to demonstrate that the balance of harms weighs clearly and unequivocally in its favor and that the public interest clearly and unequivocally favors the entry of a preliminary injunction. The harm to the government and public interest is not, however, singularly related to the CSA. Harm to the government and the public interest resulting from the court-ordered violation of the Convention remain unaddressed by UDV or the district court. Furthermore, both Judge Seymour's and Judge McConnell's attempts to minimize the significant harm flowing to the government as a result of its forced non-compliance with the Convention are flawed. With the evidence of the balance of harms and public interest in such a state, UDV has utterly failed to meet its burden under the third and fourth preliminary injunction factors.

I would reverse the district court's entry of a preliminary injunction. Because a majority of the court concludes otherwise, I respectfully dissent from parts III.B and IV of the *per curiam* opinion.

**SEYMOUR**, Circuit Judge, concurring in part and dissenting in part, joined in full by **TACHA**, Chief Judge, **PORFILIO**, **HENRY**, **BRISCOE**, and **LUCERO**, Circuit Judges, and in Part II by **MCCONNELL** and **TYMKOVICH**, Circuit Judges.

Like a majority of my colleagues, I am persuaded that the district court did not abuse its discretion in granting the preliminary injunction in this case. I respectfully dissent, however, from the majority's conclusion that the movant for a preliminary injunction must satisfy a heightened burden when the proposed injunction will alter the status quo but the injunction is not also mandatory.

**I**

It is well established that "[a] preliminary injunction is an extraordinary remedy; it is the exception rather than the rule." *GTE Corp. v. Williams*, 731 F.2d 676, 678 (10th Cir. 1984). Its commonly asserted purpose is to "preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). *See also* 11A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2947 at 123 (2d ed. 1995) (purpose of preliminary injunction is to prevent non-movant from taking unilateral action which would prevent court from providing relief to the movant on the merits).

In making the equitable determination to grant or deny a preliminary injunction, courts tend to balance a variety of factors. We have stated generally that a court will grant preliminary relief only if the plaintiff shows "(1) a substantial likelihood of success on the merits of the case; (2) irreparable injury to the movant if the preliminary injunction is denied; (3) the

threatened injury to the movant outweighs the injury to the other party under the preliminary injunction; (4) the injunction is not adverse to the public interest." *Kikumura v. Hurley*, 242 F.3d 950, 955 (10th Cir. 2001). These factors provide guideposts for a court in its attempt to minimize any harm that would result from the grant or denial of preliminary relief. The manner by which a court considers the factors, the relative weight given to each, and the standards by which a movant is required to prove them, are driven by the special and unique circumstances of any given case.

As noted by Professor Dobbs:

> [T]he gist of the standards is probably easy to understand in common sense terms even if the expression is imperfect: the judge should grant or deny preliminary relief with the possibility in mind that *an error might cause irreparable loss to either party. Consequently the judge should attempt to estimate the magnitude of that loss on each side and also the risk of error.*

DAN B. DOBBS, LAW OF REMEDIES § 2.11(2) at 189 (2d ed. 1993) (emphasis added). *American Hosp. Supply Corp. v. Hospital Prods. Ltd.*, 780 F.2d 589 (7th Cir. 1986), epitomizes this approach, noting that when a district court is

> asked to decide whether to grant or deny a preliminary injunction [it] must choose the course of action that will minimize the costs of being mistaken. . . . If the judge grants the preliminary injunction to a plaintiff who it later turns out is not entitled to any judicial relief—whose legal rights have not been violated—the judge commits a mistake whose gravity is measured by the irreparable

> harm, if any, that the injunction causes to the defendant while it is in effect. If the judge denies the preliminary injunction to a plaintiff who it later turns out is entitled to judicial relief, the judge commits a mistake whose gravity is measured by the irreparable harm, if any, that the denial of the preliminary injunction does to the plaintiff.

*Id.* at 593. Due to this inherently fluid, multi-faceted, and equitable process, we review a district court's decision to grant or deny injunctive relief for abuse of discretion. *SCFC ILC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096, 1098 (10th Cir. 1991). In so doing, we should keep in mind that

> the district judge had to act in haste, that he had to balance factors which, though they can be related in a neat formula, usually cannot be quantified, and that in dealing with the parties and their witnesses and counsel in the hectic atmosphere of a preliminary-injunction proceeding the judge may have developed a feel for the facts and equities that remote appellate judges cannot obtain from a transcript.

*American Hosp. Supply Corp.*, 780 F.2d at 594-95. Thus "it is not enough that we think we would have acted differently in the district judge's shoes; we must have a strong conviction that he exceeded the permissible bounds of judgment." *Id.* at 595.

**A.**

In *SCFC ILC*, we held that movants requesting certain preliminary injunctions must meet a heightened standard instead of satisfying the ordinary preliminary injunction test. We detailed that a party who seeks an injunction which either changes the status quo, is

mandatory rather than prohibitory, or provides the movant with substantially all the relief he would recover after a full trial on the merits, was required to "show that on balance, the four [preliminary injunction] factors weigh heavily and compellingly in his favor." *SCFC ILC, Inc.*, 936 F.2d at 1099 (emphasis added). We appear to be the only court which has adopted the specific approach of carving out three distinct categories of disfavored injunctions. Other courts have limited to two categories those preliminary injunctions deserving special scrutiny: injunctions which are mandatory or which provide the moving party with all the relief it seeks from a full trial on the merits. *See, e.g.*, *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 526 (4th Cir. 2003); *Tom Doherty Assocs. v. Saban Entm't*, 60 F.3d 27, 34-35 (2d Cir. 1995); *Acierno v. New Castle County*, 40 F.3d 645, 653 (3d Cir. 1994); *Wetzel v. Edwards*, 635 F.2d 283, 286 (4th Cir. 1980); *Anderson v. United States*, 612 F.2d 1112, 1114-15 (9th Cir. 1980).[1]

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[1] I disagree with Judge McConnell's characterization of the cases I have cited for the proposition that the other circuits limit their categories of disfavored injunctions to those which are mandatory and those which provide the movant with all the relief afforded on the merits. McConnell, J., op. at 6 n.4. As noted above, no other circuit follows our approach of identifying three categories of disfavored injunctions. Courts which speak of applying some form of heightened standard to preliminary injunctions that alter the status quo specifically define those types of injunctions as mandatory. *See Tom Doherty Assocs.* v. *Saban Entm't*, 60 F.3d 27, 33-34 (speaking broadly about applying a heightened standard to preliminary injunctions that alter the status quo, *id.* at 33, but then immediately defining with more specificity the two categories of disfavored injunctions as those which are mandatory, and those which provide all the relief sought on the merits, *id.* at 34); *see also In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 526 (4th Cir. 2003) ("Mandatory preliminary injunctions [generally] do not

In order to bring our jurisprudence in closer accord with these other circuits, and because I am convinced it will cause less confusion to the parties and the district court, I would limit our heightened standard to those two categories of preliminary injunctions.

In doing so, I do not denigrate the general notion that the purpose of a preliminary injunction is to preserve the status quo between the parties pending a full trial on the merits. But this general maxim should not be taken merely at face value or become a goal in and of itself. Rather, the very purpose of preserving the status quo by the grant of a preliminary injunction is to prevent irreparable harm pending a trial on the merits. *See*, *e.g.*, *In re Microsoft*, 333 F.3d at 525 ("The traditional office of a preliminary injunction is to protect the

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preserve the status quo . . . .") (alteration in original); *Acierno v. New Castle County*, 40 F.3d 645, 653 (3d Cir. 1994) ("A party seeking a mandatory preliminary injunction that will alter the status quo bears a particularly heavy burden in demonstrating its necessity."); *Wetzel v. Edwards*, 635 F.2d 283, 286 (4th Cir. 1980) ("Mandatory preliminary injunctions do not preserve the status quo and normally should be granted only in those circumstances when the exigencies of the situation demand such relief."); *Anderson v. United States*, 612 F.2d 1112, 1114-15 (9th Cir. 1980) ("Mandatory preliminary relief, which goes well beyond simply maintaining the status quo pendente lite, is particularly disfavored.") (citations omitted). While Judge McConnell may disagree with the manner by which I think courts should consider the question of status quo, it cannot be said I am advocating an approach that is discordant from that employed by other courts. To the contrary, by separating out and adding injunctions that alter the status quo as a third category of disfavored injunctions, it is the majority that is out of step. *See generally* DOUGLASS LAYCOCK, MODERN AMERICAN REMEDIES 450 (3d ed. 2002); Thomas R. Lee, *Preliminary Injunctions and the Status Quo*, 58 WASH. & LEE L. REV. 109 (2001).

status quo and prevent irreparable harm during the pendency of a lawsuit ultimately to preserve the court's ability to render a meaningful judgment on the merits."); *Matzke v. Block*, 542 F. Supp. 1107, 1113 (D. Kan. 1982) ("The purpose of a preliminary injunction is two-fold: it protects the plaintiff from irreparable injury and it preserves the court's ability to decide the case on the merits."); 11A WRIGHT & MILLER, § 2947 at 121 ("a preliminary injunction is an injunction that is issued to protect plaintiff from irreparable injury and to preserve the court's power to render a meaningful decision after a trial on the merits").

Given the essential role prevention of irreparable harm plays in the grant of preliminary injunctive relief,[2] district courts should consider the question of altered status quo in light of how it impacts the balance of harms between the parties and the public interest, as well as considering what attendant institutional costs may accompany the grant of such relief. As the Fifth Circuit has said, "[i]f the currently existing status quo itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the

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[2] In the course of deciding whether to grant preliminary injunctive relief, "courts have consistently noted that '[b]ecause a showing of probable irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction, the moving party must first demonstrate that such injury is likely before the other requirements for the issuance of an injunction will be considered.'" *Dominion Video Satellite v. EchoStar Satellite Corp.*, 356 F.3d 1256, 1260-61 (10th Cir. 2004) (quoting *Reuters Ltd. v. United Press Int'l, Inc.*, 903 F.2d 904, 907 (2d Cir. 1990), and listing other cases). Without a showing of irreparable harm, there exists no justification for granting the extraordinary remedy of injunctive relief prior to trial because any other harm can be compensated for by damages at the end of the trial.

injury." *Canal Auth. of the State of Florida v. Callaway*, 489 F.2d 567, 576 (5th Cir. 1974) (citations omitted). Other courts echo this refrain, noting that where preserving the status quo will perpetuate harm against the moving party, an order altering the status quo may be appropriate. *See, e.g., Friends For All Children v. Lockheed Aircraft Corp.*, 746 F.2d 816, 830 n.21 (D.C. Cir. 1984); *Crowley* v. *Local No. 82, Furniture & Piano Moving*, 679 F.2d 978, 995 (1st Cir. 1982), *reversed on other grounds*, 476 U.S. 526 (1984); *see also* 11A WRIGHT & MILLER § 2948 at 133-35. For these reasons, "[t]he focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo." *Canal Auth.*, 489 F.2d at 576. Thus a court's examination of the status quo should occur during the process of balancing the various interests and harms among the parties and the public.

**B.**

Our circuit currently employs three different standards when granting preliminary injunctions. As a base line, we have articulated that a party's right to injunctive relief must be "clear and unequivocal." *See SCFC ILC Inc.*, 936 F.2d at 1098 (citing *Penn v. San Juan Hosp.*, 582 F.2d 1181, 1185 (10th Cir. 1975)). At one end of the spectrum, we have applied SCFC ILC's "heavily and compellingly" language to injunctions requiring heightened scrutiny. *Id.* at 1098-99. At the other end, we have adopted a modified approach for the "likelihood of success on the merits" aspect of the four part preliminary injunction test for certain circumstances. Under this alternative approach, if the moving party establishes that the last three factors of the test are in its favor, the party may ordinarily satisfy the first factor by "showing that questions going to the

merits are so serious, substantial, difficult and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation." *Federal Lands Legal Consortium v. United States*, 195 F.3d 1190, 1195 (10th Cir. 1999). Within this paradigm, and in accordance with the principle that a preliminary injunction should preserve the parties' positions to prevent irreparable harm and allow the court to make a meaningful decision on the merits, the court's focus properly remains on the balance of relative harms between the parties.

In general, "[e]mphasis on the balance of [irreparable harm to plaintiffs and defendants] results in a sliding scale that demands less of a showing of likelihood of success on the merits when the balance of hardships weighs strongly in favor of the plaintiff, and vice versa." *In re Microsoft*, 333 F.3d at 526. Thus, the more likely a movant is to succeed on the merits, "the less the balance of irreparable harms need favor the [movant's] position." *Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 895 (7th Cir. 2001). And, alternatively, "if there is only slight evidence that plaintiff will be injured in the absence of interlocutory relief, the showing that he is likely to prevail on the merits is particularly important." *Canal Auth.*, 489 F.2d at 576-77. The rationality of this approach is evident: where there is a strong indication that the plaintiff is correct on the merits, the less it is likely that the defendant will be harmed by the issuance of a preliminary injunction; where there is little likelihood a plaintiff will be irreparably harmed, preliminary relief is unwarranted unless it is virtually certain plaintiff will win on the merits.

Given the special considerations and potential administrative costs at stake when a court issues a man-

datory preliminary injunction, we should more closely scrutinize whether the irreparable harm to the movant substantially outweighs any harm to the non-movant or to the public interest. The movant should clearly show the exigencies of the situation justify the rather unusual injunction. *See Tom Doherty Assocs.*, 60 F.3d at 34 ("[A] mandatory injunction should issue only upon a clear showing that the moving party is entitled to the relief requested, or where extreme or very serious damage will result from a denial or preliminary relief." (internal quotations omitted)); *Anderson*, 612 F.2d at 1114 (mandatory preliminary relief justified only where "facts and law clearly favor the moving party" or where "extreme or very serious damage will result"); *In re Microsoft*, 333 F.3d at 525 (showing for preliminary mandatory relief "must be indisputably clear"); *Wetzel*, 635 F.2d at 286 (mandatory preliminary injunctions "should be granted only in those circumstances when the exigencies of the situation demand such relief").

Although a mandatory injunction should be granted only where the moving party makes a strong showing that all the preliminary injunction factors weigh in its favor, we should abandon use of the "heavily and compellingly" language employed in *SCFC ILC*, *see* 936 F.2d at 1098-99, which is not used by any other circuit. In addition, because a party seeking the grant of a mandatory preliminary injunction must make this stronger showing, the party should not be able to rely on our circuit's modified likelihood of success on the merits standard, even where the balance of harms favors the movant. Rather, the movant for a mandatory preliminary injunction must also establish a substantial likelihood of success on the merits. *See Tom Doherty Assocs.*, 60 F.3d at 33-34 (party seeking mandatory injunc-

tion cannot rely solely on circuit's relaxed likelihood of success on merits standard); *SCFC ILC*, 936 F.2d at 1101 n.11 (applicant for disfavored injunction unlikely to satisfy higher standard without proving likelihood of success on merits).

The same is true for injunctions that provide the movant with all the relief that could be obtained at trial. *See SCFC ILC*, 936 F.2d at 1099 (applying heightened standard to preliminary injunctions that provide the movant with all relief that could be obtained at trial). In this context, however, the

> term "all the relief to which a plaintiff may be entitled" *must be supplemented by a further requirement that the effect of the order, once complied with, cannot be undone.* A heightened standard can thus be justified when the issuance of an injunction will render a trial on the merits largely or partly meaningless, either because of temporal concerns, say, a case involving the live televising of an event for the day on which preliminary relief is granted, or because of the nature of the subject of the litigation, say, a case involving the disclosure of confidential information.

*Tom Doherty Assocs.*, 60 F.3d at 35 (emphasis added). *See Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1249 (10th Cir. 2001) (citing *Tom Doherty Assocs.* for this proposition). For example, while the preliminary injunction here may give the UDV all the relief it would obtain after a full trial on the merits, the district court's order can nonetheless be "undone" should the UDV ultimately be unsuccessful at trial. This situation is clearly different from the examples listed in *Tom Doherty Assocs.* Moreover, the grant of a

preliminary injunction in this case does not "make it difficult or impossible to render a meaningful remedy," *id.*, to the government. If the UDV does not prevail at trial, the government will be able to enforce the CSA against the church and its members and comply with the Convention.

In sum, we should limit our categories of injunctions requiring greater scrutiny to those which are mandatory or which afford the movant all the relief it seeks after a full trial on the merits, and abandon the use of *SCFC ILC's* "heavily and compellingly" language. In addition, a party seeking an injunction requiring greater scrutiny may not rely on our relaxed "success on the merits" standard but must make a strong showing that it has a likelihood of success on the merits and that the balance of harms weighs in its favor. However, I depart from my colleagues who hold that a heightened standard should always be applied when the injunction will change the status quo. Rather, district courts should assess alteration of the status quo in light of its impact on the balance of harms among the parties and the public interest.

**II**

Turning to the question of whether the district court properly granted the preliminary injunction to the UDV, our court reviews the district court's grant of injunctive relief for abuse of discretion and "examine[s] whether the district court committed error of law or relied on clearly erroneous fact findings." *Walmer v. U.S. Dep't of Defense*, 52 F.3d 851, 854 (10th Cir. 1995). We also give due deference "to the district court's evaluation of the substance and credibility of testimony, affidavits, and other evidence. We will not challenge that evaluation unless it finds no support in the record,

deviates from the appropriate legal standard, or follows from a plainly implausible, irrational or erroneous reading of the record." *United States v. Robinson*, 39 F.3d 1115, 1116 (10th Cir. 1994).

The district court focused the majority of its analysis on whether the UDV could satisfy the likelihood of success on the merits prong of the preliminary injunction test. *See Kikumura*, 242 F.3d at 955 (listing elements of preliminary injunction test). Because the government did not dispute for the purpose of the injunctive proceeding that its enforcement of the CSA and the United Nations Convention on Psychotropic Substances (Convention or treaty) imposed a substantial burden on the UDV's sincere exercise of religion, the UDV established a *prima facie* case of a RFRA violation. *See id.* at 960. To undercut this showing of likelihood of success, the government had the burden of establishing that "the challenged regulation furthers a compelling interest in the least restrictive manner." *See* 42 U.S.C. § 2000bb-1(b); *United States v. Meyers*, 95 F.3d 1475, 1482 (10th Cir. 1996).

The government proffered three compelling interests—risks to the health of the UDV members by the use of *hoasca*, risk of diversion of *hoasca* for non-religious purposes, and compliance with the Convention. "Believing the Government's strongest arguments for prohibiting Uniao do Vegetal's *hoasca* use to be health and diversion risks, the district court did not ask the parties to present evidence on the Convention at the hearing." *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 342 F.3d 1170, 1183 (10th Cir. 2003). After examining the parties' evidence on the first two issues, the court found the evidence to be in equipoise for each. The court also decided the treaty does not

cover *hoasca*. The court therefore concluded the government had "failed to carry its heavy burden of showing a compelling interest in protecting the health of the UDV members using *hoasca* or in preventing the diversion of *hoasca* to illicit use." *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 282 F. Supp. 2d 1236, 1269 (D.N.M. 2002). Hence, the court ruled the UDV had demonstrated a substantial likelihood of success on the merits.

The district court then turned to the remaining preliminary injunction factors and determined the UDV satisfied each. The court found the UDV established irreparable injury because its right to the free exercise of religion was being impaired. With respect to harm to the government and the balance of harms, the court held that

> in balancing the government's concerns against the injury suffered by the Plaintiffs when they are unable to consume *hoasca* in their religious ceremonies, the Court concludes that, in light of the closeness of the parties' evidence regarding the safety of *hoasca* use and its potential for diversion, the scale tips in the [church's] favor.

*Id.* at 1270. The court granted a preliminary injunction to the UDV pending a decision on the merits.

The government contends that the preliminary injunction granted by the district court is mandatory and changes the status quo, and that the district court erred in failing to require the UDV to make a stronger showing to succeed. I disagree. This case is unique in many respects because it involves a clash between two federal statutes, one based in the First Amendment to the Constitution and protecting an individual's free exer-

cise of religion and the other serving the important governmental and public interests of protecting society against the importation and sale of illegal drugs. This case also serves as an example of how challenging it can be to determine whether an injunction is mandatory as opposed to prohibitory, or whether it alters the status quo.

I am not persuaded the injunction here is mandatory. Rather, it temporarily prohibits the government from treating the UDV's sacramental use of *hoasca* as unlawful under the CSA or the treaty. It also orders the government not to

> intercept or cause to be intercepted shipments of hoasca imported by the UDV for religious use, prosecute or threaten to prosecute the UDV, its members, or bona fide participants in UDV ceremonies for religious use of hoasca, or otherwise interfere with the religious use of hoasca by the UDV, its members, or bona fide participants in UDV ceremonies. . . .

Aplt. br., Add. B at 2.

The government contends the injunction is mandatory because it includes "36 separate provisions requiring specific affirmative action by the government to facilitate the UDV's use of *hoasca*." Aplt. Supp. En Banc br. at 20. In so arguing, the government fails to acknowledge that the additional provisions were added to the injunction by the district court in response to the government's insistence that the UDV be subject to some form of governmental oversight in its importation and use of *hoasca*. In large measure, the injunction's terms detail how the UDV must comply with the importation and distribution regulations for controlled

substances. The injunction outlines how the regulations should be specifically construed regarding the UDV and lists provisions from which the church should be exempted. The injunction's terms also make clear that while the UDV is required to comply with the regulations, the government cannot rely on potential technical violations of the regulations by the church, or an overly broad reading of the regulations, to bar the UDV's importation of *hoasca*. While the order's terms do not exactly mirror those proposed to the court by the government, nor are they nearly as broad as the government might have hoped, they nonetheless are in the injunction because the government demanded the UDV be subject to some form of regulatory control in the course of importing and distributing *hoasca*. In this regard, the order's terms outline how the church must comply with the regulations while still protecting the church's importation and use of its sacrament.

Similarly, while some of the injunction's provisions mandate that the parties take specific actions, the order is nonetheless properly characterized as prohibitory. Read as a whole, the additional terms in the order *mandate that the UDV* comply with specific drug importation laws, while the provisions conversely *permit the government* to perform its regulatory functions with respect to the importation of controlled substances, up to but not including barring the UDV's use of hoasca for sacramental purposes. However, the overall effect of the injunction is to prohibit the government from enforcing the CSA and the treaty against the UDV.

There is no doubt that determining whether an injunction is mandatory as opposed to prohibitory can be vexing. In *Abdul Wali v. Coughlin*, the court recognized this difficulty but emphasized that

> [t]he distinction between mandatory and prohibitory injunctions, however, cannot be drawn simply by reference to whether or not the status quo is to be maintained or upset. As suggested by the terminology used to describe them, these equitable cousins have been differentiated by examining whether the non-moving party is being ordered to perform an act, or refrain from performing. In many instances, this distinction is more semantical than substantive. For to order a party to refrain from performing a given act is to limit his ability to perform any alternative act; similarly, an order to perform in a particular manner may be tantamount to a proscription against performing in any other.

*Abdul Wali v. Coughlin*, 754 F.2d 1015, 1025-26 (2d Cir. 1985), overruled on other grounds by *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 n.2 (1987). In determining whether to define the contested injunction in the case before it as mandatory or prohibitory, the court in *Abdul Wali* looked to the gravamen of the plaintiff's complaint and found it did indeed seek to prohibit action on the part of the defendant, even though one could reasonably argue the injunction changed the status quo. *Id.* at 1026. So too in the case before us. The gravamen of the church's claim is to stop the government from enforcing the CSA against it and infringing on the use of its sacrament. Read in this light, the overall tone and intent of the order remains prohibitory because its purpose is to prohibit the government from interfering with the UDV's religious practices.

With respect to the question of status quo, it is generally described as "the last peaceable uncontested status existing between the parties before the dispute developed." 11A WRIGHT & MILLER § 2948, at 136 n.14

(listing cases). *See also Prairie Band of Potawatomi Indians*, 253 F.3d at 1249; *Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.*, 269 F.3d 1149, 1155 (10th Cir. 2001); *SCFC ILC, Inc.*, 936 F.2d at 1100 n.8. Here, however, we are faced with a conflict between two federal statutes, RFRA and the CSA, plus an international treaty, which collectively generate important competing status quos.

The status quo for the UDV was that it was practicing its religion through its importation and use of *hoasca* at religious ceremonies. I am not suggesting, as Judge Murphy argues, that the status quo is the UDV's *legal right* pursuant to RFRA to the free exercise of its religion. Rather, as a matter of fact the church was actively engaged in its religious practices.[3] Status quo for the government immediately prior to this litigation was its enforcement of the drug laws against the UDV in accordance with the CSA and the Convention, which occurred after the government discovered the UDV was importing *hoasca* for religious purposes and exercised its prosecutorial discretion to stop that importation.

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[3] I also disagree with Judge Murphy's contention that both the church and the government "recognized that the importation and consumption of *hoasca* violated the CSA," Murphy, J., opin. at 10, and therefore the status quo was solely the government's enforcement of the CSA and compliance with the treaty. The UDV may have acted in a somewhat clandestine manner in the course of importing the *hoasca* and using it in its religious ceremonies. However, its importation and use of the tea was premised on its firmly held belief that such religious activity was in fact protected from government interference by its right to the free exercise of its religion.

We are thus presented with two plausible status quos, each of them important. Moreover, since both parties contest the validity of the other's actions, it is difficult to describe either position as "the last peaceable, uncontested status existing between the parties." The injunction granted by the district court can certainly be read to have altered the status quo for the government and thereby caused it harm. Conversely, failure of the court to grant the injunction would have altered the status quo for the church, causing it harm. As discussed above, injunctive relief may be warranted where preserving the status quo perpetuates harm against the moving party. *See, e.g., Crowley*, 679 F.2d at 995 (preliminary relief appropriate where perpetuation of status quo worked continuing harm to plaintiffs); *Canal Auth.*, 489 F.2d at 576 (status quo should not be perpetuated where it causes irreparable harm to one of the parties); *Sluiter v. Blue Cross & Blue Shield of Michigan*, 979 F. Supp. 1131, 1136 (E.D. Mich. 1997) (prevention of irreparable harm, rather than maintenance of status quo, should guide court in granting mandatory injunction, especially where preserving status quo severely threatens lives of movants). And the competing harms that might arise from a change in the status quo can be fully addressed under the balance of harms and public interest facets of the preliminary injunction test. *See, e.g., Millennium Restaurants Group, Inc. v. City of Dallas*, 181 F. Supp. 2d 659, 667 (N.D. Tex. 2001) (balancing irreparable harm to sexually oriented business' First Amendment right of free expression against temporary harm to city by virtue of injunction preventing city from revoking license of business); *Mediplex of Massachusetts, Inc. v. Shalala*, 39 F. Supp. 2d 88, 100-01 (D. Mass. 1999) (preliminary injunction appropriate, in part, where harm to nursing

facility residents arising from government's intention to close facility outweighed more general harm to government); *Canterbury Career School, Inc. v. Riley*, 833 F. Supp. 1097, 1105-06 (D.N.J. 1993) (injunction properly issued where plaintiff would suffer loss of federal funding and accreditation as balanced against more general harm to government).

Turning to the district court's review of the four preliminary injunction factors and giving due deference to its weighing of the evidence, I am convinced for all of the reasons described by the district court, see supra at 13-15, and set forth in the panel opinion, *O Centro*, 342 F.3d at 1179-87, that the court did not abuse its discretion in concluding the UDV has established the first preliminary injunction factor, a substantial likelihood of success on the merits of the case. *Id.* at 1187.[4] With respect to irreparable harm, the district court, acknowledging its jurisdiction was founded upon RFRA, correctly recognized that the violation of one's right to the free exercise of religion necessarily constitutes irreparable harm. *See, e.g., Kikumura*, 242 F.3d at 963

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[4] I do not, however, include footnote 2 of the panel majority opinion in my reasoning here. *See O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 342 F.3d 1170, 1173 n.2 (10th Cir. 2003). The language in that footnote could lead one to conclude that a plaintiff's initial showing of a prima facie RFRA violation would satisfy the likelihood of success on the merits prong of the preliminary injunction test regardless of the government's successful articulation of a restrictively applied compelling interest. Such a conclusion would be incorrect; only an unrebutted prima facie showing could establish the likelihood of success on the merits of a RFRA claim. See *id.* at 1179-87 (discussion regarding UDV's showing likelihood of success on the merits by virtue of government's failure to establish compelling interest applied in least restrictive manner).

("courts have held that a plaintiff satisfies the irreparable harm analysis by alleging a violation of RFRA"); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) ("although plaintiff's free exercise claim is statutory rather than constitutional, the denial of the plaintiff's right to the free exercise of his religious beliefs is a harm that cannot be adequately compensated monetarily"). The harm to the UDV from being denied the right to the use of a sacrament in its religious services is indisputably irreparable.

The district court then balanced the irreparable harm to the UDV against the harm the government would suffer from a preliminary injunction prohibiting its enforcement of the CSA against the church's religious use of a controlled substance, and from its compliance with the Convention. As Judge McConnell so aptly observes, one cannot evaluate the balance of harm and public interest factors separately and isolated from Congress' own balancing of these factors in RFRA. *See* McConnell, J., opin. at 33-36. In RFRA, Congress determined that the balance of equities and public interest should weigh in favor of the free exercise of religion and that this settled balance should only be disrupted when the government can prove, by specific evidence, that its interests are compelling and its burdening of religious freedom is as limited as possible. *See* 42 U.S.C. § 2000bb-1(a)-(b).

Certainly the interests of the government as well as the more general public are harmed if the government is enjoined from enforcing the CSA against the general importation and sale of street drugs, or from complying with the treaty in this regard. But this case is not about enjoining enforcement of the criminal laws against the use and importation of street drugs.

Rather, it is about importing and using small quantities of a controlled substance in the structured atmosphere of a bona fide religious ceremony. In short, this case is about RFRA and the free exercise of religion, a right protected by the First Amendment to our Constitution. In this context, what must be assessed is not the more general harm which would arise if the government were enjoined from prosecuting the importation and sale of street drugs, but rather the harm resulting from a temporary injunction against prohibiting the controlled use of *hoasca* by the UDV in its religious ceremonies while the district court decides the issues at a full trial on the merits.

As asserted by the government, the relevant harms in this context are the risk of diversion of *hoasca* to non-religious uses and the health risks to the UDV members who ingest the tea. As the panel opinion explained, however, the district court found that the parties' evidence regarding health risks to the UDV members from using *hoasca* as a sacrament in their religious services was "in equipoise," and the evidence regarding the risk of diversion to non-ceremonial users was "virtually balanced" or "may even . . . tip the scale slightly in favor of Plaintiffs' position." *See O Centro*, 342 F.3d at 1179-83 (citing district court and reviewing evidence).

I disagree with Judge Murphy's assertion that because plaintiffs have the burden of proof on the preliminary injunction factors they necessarily lose if the evidence is in equipoise on the question of harm to the government's asserted interests. *See* Murphy, J., opin. at 39-40. As Judge Murphy recognizes, a plaintiff seeking a preliminary injunction has the burden of showing that the harm to it *outweighs* any harm to the party to

be enjoined or to the public interest. *See Kikumura*, 242 F.3d at 955. Here the harm to the UDV from being denied the right to freely exercise its religion, which under anyone's measure carries significant weight and is *actually occurring*, must be measured against the potential risks of diversion of *hoasca* to non-religious uses and harm to the health of church members consuming the *hoasca*. As the UDV established to the district court's satisfaction, neither of the potential harms asserted by the government are more likely than not to occur. Thus, the balance is between actual irreparable harm to plaintiff and potential harm to the government which does not even rise to the level of a preponderance of the evidence.

Likewise, the harm resulting to the government from a violation of the Convention in this context is similar to the harm suffered as a result of the government's temporary inability to enforce the CSA against the church. As with the CSA, the treaty must be read in light of RFRA and the religious use of the controlled substance here.[5] While the general intent of the Convention was to prevent the illicit use and trafficking of psychotropic substances, it recognized that plants containing such

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[5] As the panel opinion makes clear:

> [T]he Supreme Court has directed "that an Act of Congress . . . is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute, to the extent of conflict, renders the treaty null." *Id.* (quoting *Reid v. Covert*, 354 U.S. 1, 18) (1957) (plurality opinion)). *See also Whitney v. Robertson*, 124 U.S. 190, 194 (if treaty and statute conflict, "the one last in date will control the other").

*O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 342 F.3d 1170, 1183-84 (10th Cir. 2003).

substances were often used for legitimate religious purposes. It therefore permitted signatory nations to seek an exemption from the treaty for indigenous plants containing prohibited substances "traditionally used by certain small, clearly determined groups in magical or religious rites." *See* 1971 Convention on Psychotropic Substances, Art. 32(4), 32 U.S.T. 543. Indeed, the United States obtained such an exemption for peyote. *See O Centro*, 342 F.3d at 1175-76.

In light of the Convention's acknowledgment that the use of psychotropic substances in the course of religious rituals may warrant an exception from the treaty's terms, as well as the exemption granted to the United States for peyote, the government's argument that it will be significantly harmed by a preliminary injunction temporarily restraining it from enforcing the treaty against the UDV does not ring entirely true. This injunction temporarily bars the government in small part from abiding by a treaty which contemplates the religious use of plants containing prohibited substances, in order that the UDV's exercise of its religious faith may be protected pending a full trial on the merits.

Moreover, given the competing status quos represented in this case—the church exercising its religion versus the government enforcing the drug laws and complying with the treaty—the district court's inclusion of the additional terms in the preliminary injunction, in which the government is permitted to perform most of its regulatory functions regarding the importation of this controlled substance, is a reasonable attempt to balance the harms suffered by either party until a full trial can be had on the merits. Viewed in this light, and given the conclusion that the UDV has a strong likelihood of succeeding on the merits of its claim

under RFRA, the government's argument that it would be significantly harmed by a temporary injunction is considerably weakened.

With respect to harm to the public interest, there is an important public interest in both the enforcement of our criminal drug laws and in compliance with our treaty commitments. But there is an equally strong public interest in a citizen's free exercise of religion, a public interest clearly recognized by Congress when it enacted RFRA and by the signatories to the Convention when they authorized exemptions for religious use of otherwise prohibited substances.[6] It cannot go without comment that Congress, in response to the Supreme Court's ruling in *Employment Division v. Smith*, 492 U.S. 872 (1990), enacted RFRA to overturn the holding in that case. As noted by the panel, the Supreme Court held in Smith that the "Free Exercise Clause of the First Amendment did not require the State of Oregon to exempt from its criminal drug laws the sacramental ingestion of peyote by members of the Native American Church." *O Centro*, 342 F.3d at 1176 (citing Smith, 492 U.S. at 885-890). According to *Smith*, "[g]enerally applicable laws . . . . [could] be applied to religious exercises regardless of whether the government [demonstrated] a compelling interest" for enforcing the law. *Id.* In response, Congress passed RFRA

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[6] Lending their voice as amici curiaein support of the UDV's position are a variety of other religious organizations. Among these groups are the Christian Legal Society, the National Association of Evangelicals, Clifton Kirkpatrick, as the Stated Clerk of the General Assembly of the Presbyterian Church, and the Queens Federation of Churches, Inc. The presence of these varied groups as advocates for the UDV further highlights the vital public interest in protecting a citizen's free exercise of religion.

to restore the compelling interest test articulated in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972).[7] Thus, pursuant to RFRA, there is a strong public interest in the free exercise of religion even where that interest may conflict with the CSA.[8]

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[7] The Supreme Court has subsequently found RFRA unconstitutional as applied to the states. *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). However, RFRA is still applicable to the federal government. *Kikumura v. Hurley*, 242 F.3d 950, 960 (10th Cir. 2001).

[8] Judge Murphy relies heavily on Congress' specific findings that the importation and consumption of controlled substances are adverse to the public interest, *see* Murphy, J., opin. at 38-39, while totally ignoring the immediate and strong reaction Congress had to the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). The Congressional findings accompanying RFRA explicitly state that

> the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution; . . . laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise; . . . [and] governments should not substantially burden religious exercise without compelling justification.

42 U.S.C. § 2000bb(a)(1)-(3). Congress went on to express its displeasure with the Supreme Court's decision in Smith and stated that the compelling interest test set out in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), struck a "sensible balance[] between religious liberty and competing prior governmental interests." 42 U.S.C. § 2000bb(a)(4)-(5).

In making this observation, I do not assert, as Judge Murphy suggests, that Congress' findings in conjunction with its passage of the CSA are totally irrelevant, or that the dissent erred in its reference to them. *See* Murphy, J., opin. at 39 n.13. Rather, it is my position that the findings articulated by Congress in the CSA cannot be viewed without reference to Congress' adamant

For all the reasons stated above, even under the heightened standard affirmed by a majority of this court, the district court did not abuse its discretion in granting the injunction to the church. The court held that

> in balancing the Government's concerns [regarding harm] against the injury suffered by the [church] when [its members are] unable to consume hoasca in their religious ceremonies, this Court concludes that, in light of the closeness of the parties' evidence regarding the safety of hoasca use and its potential for diversion, the scale tips in the [church's] favor.

*O Centro*, 282 F. Supp. 2d at 1270. It also noted that by issuing the injunction, the public's interest in the protection of religious freedoms would be furthered. *Id.* The district court's ruling is appropriate in light of Congress' implicit RFRA determination that the harm prevented and public interest served by protecting a citizen's free exercise of religion must be given controlling weight, barring the government's proof, by specific evidence, that its interests are more compelling. Here, the government failed to overcome Congress' determination.

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affirmation that the free exercise of religion is an unalienable right to be burdened only under the most compelling of government justifications.

McCONNELL, J., joined by Tymkovich, J., concurring, and joined by HARTZ, J., and O'BRIEN, J., as to Part I.

This Court has traditionally required a heightened showing for preliminary injunctions in three "disfavored" categories: injunctions that disturb the status quo, mandatory injunctions, and injunctions that afford the movant substantially all the relief it may recover at the conclusion of a full trial on the merits. *SCFC ILC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096, 1098-99 (10th Cir. 1991). We heard this case en banc to consider whether to jettison the heightened standard for preliminary injunctions that disturb the status quo. A majority of this Court has concluded that there are reasons—not fully accounted for in the balance of harms analysis—for courts to disfavor preliminary injunctions that disturb the status quo, and thus reaffirms our traditional rule (with slight modification and clarification). *See* Opinion of Murphy, J., at 1-10. A different majority has concluded that, even under the heightened standard, Appellee O Centro Espirita Beneficiente Uniao do Vegetal ("UDV") is entitled to a preliminary injunction against enforcement of laws against the possession and use of its sacramental substance, *hoasca*. Opinion of Seymour, J., at 28. I write separately to explain why both halves of this holding, in my opinion, are correct.[1]

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[1] Judges Seymour and Murphy have each written opinions that concur in part of the holding of the en banc court and dissent from the other part. For convenience, I will refer to those portions of these opinions that dissent from the en banc holding as a "dissent," and to those portions that concur in the holding as a "concurrence." I join the per curiam opinion in its entirety. I join Part I of Judge Murphy's separate opinion, and Part II of Judge Seymour's separate opinion, on the understanding that the analysis

**1. A Heightened Standard Should Apply to Preliminary Injunctions That Disturb the Status Quo**

The Supreme Court has stated that preliminary injunctions have the "limited purpose" of "merely [preserving] the relative positions of the parties until a trial on the merits can be held." *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). This emphasis on preserving the status quo is not the same as, and cannot be reduced to, minimizing irreparable harm to the parties during the pendency of litigation, as suggested by the dissent. See Opinion of Seymour, J., at 5-6. At the preliminary injunction stage, before there has been a trial on the merits, the function of the court is not to take whatever steps are necessary to prevent irreparable harm, but primarily to keep things as they were, until the court is able to determine the parties' respective legal rights. That is why, in addition to the four preliminary injunction factors of harm to the movant, balance of harm, public interest, and likelihood of success on the merits, this Court has required district courts to take into account whether preliminary relief would preserve or disturb the status quo. The burden of justifying preliminary relief is higher if it would disturb the status quo. *SCFC ILC, Inc.*, 936 F.2d at 1098-99.

There is no reason to think that the "general maxim" that "the purpose of a preliminary injunction is to preserve the status quo between the parties pending a full trial on the merits" is one that "should not be taken merely at face value" or disregarded except insofar as it "impacts the balance of harms between the parties and

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holds "even under the heightened standard affirmed by a majority of this court." Opinion of Seymour, J., at 28.

the public interest." Opinion of Seymour, J., at 6, 7. A judicial version of Hippocrates' ancient injunction to physicians—above all, to do no harm—counsels against forcing changes before there has been a determination of the parties' legal rights. The settled rule of our tradition is that losses should remain where they fall until an adequate legal or equitable justification for shifting them has been demonstrated.

Traditional equity practice held that the sole purpose of a preliminary injunction was to preserve the status quo during the pendency of litigation. *See*, *e.g.*, *Farmers' R.R. Co.* v. *Reno, Oil Creek & Pithole Ry. Co.*, 53 Pa. 224 (Pa. 1866) (dissolving an injunction that blocked defendants from continuing to use certain land in their possession because the sole purpose of a preliminary injunction is to preserve the status quo); *Chicago, St. Paul & Kansas City R.R. Co.* v. *Kansas City, St. Joseph & Council Bluffs R.R. Co.*, 38 F. 58, 60 (C.C.W.D. Mo. 1889) (noting that a higher standard applies to mandatory injunctions that disrupt the status quo); *New Orleans & North Eastern R.R. Co.* v. *Mississippi, Terre-aux Boeufs & Lake R.R. Co.*, 36 La. Ann. 561 (La. 1884) (maintaining an injunction insofar as it maintained the status quo, but dissolving that portion that did not); *Warner Bros. Pictures* v. *Gittone*, 110 F.2d 292, 293 (3d Cir. 1940) (per curiam) ("Irreparable loss resulting from refusal to accord the plaintiff a new status, as distinguished from interference with rights previously enjoyed by him, does not furnish the basis for interlocutory relief."); *Levy* v. *Rosen*, 258 Ill. App. 262 (Ill. App. Ct. 1930) ("An interlocutory order is usually granted to preserve the status quo, but the order in this appeal did not do that, but changed the status quo. The entry of such order was clearly erroneous."); *Gill* v.

*Hudspeth County Conservation & Reclamation Dist. No. 1*, 88 S.W.2d 517, 519 (Tex. Civ. App. 1935) ("[T]he court's discretion should be exercised against the writ if its issuance would change the status quo."); *Bowling* v. *Nat'l Convoy & Trucking Co.*, 135 So. 541 (Fla. 1931) ("Since the object of a preliminary injunction is to preserve the status quo, the court will not grant such an order where its effect would be to change the status."); *Gates* v. *Detroit & Mackinac Ry. Co.*, 115 N.W. 420, 421 (Mich. 1908) (dissolving that portion of a preliminary injunction that went beyond the status quo); *Jones* v. *Dimes*, 130 F. 638, 639 (D. Del. 1904) (relaxing the burden on the moving party when the requested injunction merely maintained the status quo); 1 James L. High, *A Treatise on the Law of Injunctions* (Chicago: Callaghan & Co. 1890, 3d ed.) § 4 at 5 ("The sole object of an interlocutory injunction is to preserve the subject in controversy in its then condition, and, without determining any questions of right").

To be sure, it is sometimes necessary to require a party who has recently disturbed the status quo to reverse its actions. Such an injunction restores, rather than disturbs, the status quo ante, and is thus not an exception to the rule. "Status quo" does not mean the situation existing at the moment the law suit is filed, but the "last peaceable uncontested status existing between the parties before the dispute developed." 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2948 (2d ed. 1995).[2] Thus, courts of equity have long issued pre-

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[2] This, too, is a traditional principle of equity practice. *See, e.g.*, *Fredericks* v. *Huber*, 37 A. 90, 91 (Pa. 1897); *Bowling* v. *Nat'l Convoy & Trucking Co.*, 135 So. 541, 544 (Fla. 1931); *Bellows* v. *Ericson*, 46 N.W. 2d 654, 659 n.9 (Minn. 1951); *State ex rel.*

liminary injunctions requiring parties to *restore* the status quo ante. *Shanaman* v. *Yellow Cab Co.*, 421 A.2d 664, 667 (Pa. 1980) (reversing a preliminary injunction because "the purpose of a mandatory preliminary injunction is to restore the status quo" and the injunction actually disrupted that status); *Morgan* v. *Smart*, 88 S.W. 2d 769, 772 (Tex. Civ. App. 1935) ("[T]here are no real exceptions to the rule that the status quo will not be disturbed by a preliminary injunction, and when by such an injunction the possession of property is properly ordered to be restored it is not to disturb the status quo, but to avoid mistaking the true status and to avoid preserving a false one.").

In recent decades, most courts—and all federal courts of appeal—have come to recognize that there are cases in which preservation of the status quo may so clearly inflict irreparable harm on the movant, with so little probability of being upheld on the merits, that a preliminary injunction may be appropriate even though it requires a departure from the status quo. *See*, *e.g.*, *Canal Authority* v. *Callaway*, 489 F.2d 567, 576 (5th Cir. 1974).[3] But preliminary injunctions that disturb the status quo, while no longer categorically forbidden, remain disfavored. Only one federal court of appeals

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*McKinley Automotive, Inc.* v. *Oldham*, 584 P.2d 741, 743 n.3 (Or. 1978); *Weis* v. *Renbarger*, 670 P.2d 609, 611 (Okla. Ct. App. 1983).

[3] Some states continue to make preservation of the status quo a necessary requirement for all preliminary injunctions. *See*, *e.g.*, *Postma* v. *Jack Brown Buick, Inc.*, 626 N.E. 2d 199, 203 (Ill. 1993) (stating categorically that "preliminary injunctions are improper where they tend to change the status quo of the parties rather than preserve it"); *County of Richland* v. *Simpkins*, 560 S.E. 2d 902, 906 (S.C. Ct. App. 2002) (noting that the sole purpose of a preliminary injunction is to preserve the status quo, and affirming the denial of an injunction that would change that status).

has concluded that courts should simply strive to minimize irreparable harm, with no special attention to the status quo, as our dissenters suggest. *United Food & Commercial Workers Union, Local 1099* v. *Southwest Ohio Reg'l Transit Auth.*, 163 F.3d 341, 348 (6th Cir. 1998); *see* Opinion of Seymour, J., at 12.[4]

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[4] I am puzzled by the dissent's suggestion that abandoning heightened scrutiny for preliminary injunctions that disturb the status quo would "bring our jurisprudence in closer accord" with "other circuits." Opinion of Seymour, J., at 4-5, citing *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 526 (4th Cir. 2003); *Tom Doherty Assocs.* v. *Saban Entm't*, 60 F.3d 27, 34-35 (2d Cir. 1995); *Acierno* v. *New Castle County*, 40 F.3d 645, 653 (3d Cir. 1994); *Wetzel* v. *Edwards*, 635 F.2d 283, 286 (4th Cir. 1980); *Anderso*n v. *United States*, 612 F.2d 1112, 1114-15 (9th Cir. 1980). Certainly that is not true of the Second Circuit. In the very opinion cited by the dissent, *Tom Doherty*, the Second Circuit states:

> [W]e have required the movant to meet a higher standard where: (i) *an injunction will alter, rather than maintain, the status quo*, or (ii) an injunction will provide the movant with substantially all the relief sought and that relief cannot be undone even if the defendant prevails at a trial on the merits.

60 F.3d at 33-34 (emphasis added). The other cited circuits blend the disfavored categories of mandatory injunctions and those that disturb the status quo, but continue to treat the latter as requiring a heightened showing. For example, the Third Circuit decision cited by the dissenters holds as follows:

> A primary purpose of a preliminary injunction is maintenance of the status quo until a decision on the merits of a case is rendered. A mandatory preliminary injunction compelling issuance of a building permit fundamentally alters the status quo. . . . *A party seeking a mandatory preliminary injunction that will alter the status quo bears a particularly heavy burden in demonstrating its necessity.*"

*Acierno* v. *New Castle County*, 40 F.3d at 647, 653 (emphasis added; citation omitted). The other cited cases are to similar effect. *See Anderson* v. *United States*, 612 F.2d at 1114-15

There are sound reasons of jurisprudence in support of the traditional view that preliminary injunctions that disturb the status quo require heightened justification. A preliminary injunction of any sort is an "extraordinary" and "drastic" remedy. *See United States ex rel. Potawatomi Indian Tribe* v. *Enter. Mgmt. Consultants, Inc.*, 883 F.2d 886, 888-89 (10th Cir. 1989). Judicial power is inseparably connected with the judicial duty to decide cases and controversies by determining the parties' legal rights and obligations. *See Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). A preliminary injunction is remarkable because it imposes a constraint on the enjoined party's actions in advance of any such determination. That is, a preliminary injunction forces a party to act or desist from acting, not because the law requires it, but because the law *might* require it. This is all the more striking because, given that many preliminary injunctions must be granted hurriedly and on the basis of very limited evidence, deciding whether to grant a preliminary injunction is normally to make a choice under conditions of grave uncertainty. *See Heideman* v. *South Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003).

It is one thing for a court to preserve its power to grant effectual relief by preventing parties from making unilateral and irremediable changes during the

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("Mandatory preliminary relief, which goes well beyond simply maintaining the status quo pendente lite, is particularly disfavored, and should not be issued unless the facts and law clearly favor the moving party."); *In re Microsoft Corporation Antitrust Litigation*, 333 F.3d at 526 ("Mandatory preliminary injunctions [generally] do not preserve the status quo and normally should be granted only in those circumstances when the exigencies of the situation demand such relief."), *quoting Wetzel* v. *Edwards*, 635 F.2d at 286.

course of litigation, and quite another for a court to force the parties to make significant alterations in their practices before there has been time for a trial on the merits. *See*, *e.g.*, *Gittone*, 110 F.2d at 293 ("[T]he effect of the preliminary injunction which the court granted was not to preserve the status quo but rather to alter the prior status of the parties fundamentally. Such an alteration may be directed only after final hearing."); *In re Marriage of Schwartz*, 475 N.E. 2d 1077, 1079 (Ill. App. Ct. 1985) ("It is not the purpose of the preliminary injunction to determine controverted rights or decide the merits of the case. . . . A preliminary injunction is merely provisional in nature, its office being merely to preserve the status quo until a final hearing on the merits.").

Moreover, preserving the status quo enables the court to stay relatively neutral in the underlying legal dispute. The restrictions placed on the parties can be understood as requiring only that they act in a manner consistent with the existence of a good-faith dispute about the relevant legal entitlements. The moving party is not given any rights, even temporarily, that would normally be his only if the legal dispute were resolved in his favor. For example, ownership disputes often raise concerns that the defendant in possession would overuse or waste the property before a complainant could regain possession through legal proceedings. Under those circumstances, equitable courts regularly enjoin the waste, ordering the defendant to preserve the property in statu quo. The general rule, however, is that except in the most exceptional cases, a court of equity cannot go beyond the status quo by putting the moving party into possession of the disputed property, even though, presumably, being deprived of the interim

ability to enjoy the property would often constitute irreparable harm. *See*, *e.g.*, *Farmers' R.R. Co.*, *supra*; *Morgan* v. *Smart*, 88 S.W.2d 769, 771 (Tex. Civ. App. 1935) ("It is not the function of a preliminary injunction to transfer the possession of land from one person to another pending an adjudication of the title, except in cases in which the possession has been forcibly or fraudulently obtained . . . [and the injunction is necessary so that] the original status of the property [may] be preserved pending the decision of the issue."), *quoting Simms* v. *Reisner*, 134 S.W. 278, 280 (Tex. Civ. App. 1911). *See generally Mandatory Injunction Prior to Hearing of Case*, 15 A.L.R.2d 213, §§ 22-23 (collecting dozens of cases on this issue).

Fundamentally, the reluctance to disturb the status quo prior to trial on the merits is an expression of judicial humility. As Judge Murphy points out, a court bears more direct moral responsibility for harms that result from its intervention than from its nonintervention, and more direct responsibility when it intervenes to change the status quo than when it intervenes to preserve it. *See* Opinion of Murphy, J., at 5. Moreover, like the doctrine of *stare decisis*, preserving the status quo serves to protect the settled expectations of the parties. Disrupting the status quo may provide a benefit to one party, but only by depriving the other party of some right he previously enjoyed. Although the harm and the benefit may be of equivalent magnitude on paper, in reality, deprivation of a thing already possessed is felt more acutely than lack of a benefit only hoped for. As the Supreme Court observed in *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 282-83 (1986), "[d]enial of a future employment opportunity is not as intrusive as loss of an existing job." Percipient

students of human nature have often made similar observations. David Hume, for example, wrote:

> Such is the effect of custom, that it not only reconciles us to any thing we have long enjoy'd, but even gives us an affection for it, and makes us prefer it to other objects, which may be more valuable, but are less known to united States What has long lain under our eye, and has often been employ'd to our advantage, that we are always the most unwilling to part with; but can easily live without possessions, which we never have enjoy'd, and are not accustom'd to.

David Hume, *A Treatise of Human Nature*, bk. 3, pt. 2, § 3, para. 4 (1739). *See also*, *e.g.*, Aristotle, *Nichomachean Ethics*, bk. IX, ch. 1, at 1164b17-19 (W.D. Ross trans.), in *The Basic Works of Aristotle* (Richard McKeon ed., 1941) ("For most things are not assessed at the same value by those who have them and those who want them; each class values highly what is its own. . . . ."). Justice Holmes has justified the doctrine of adverse possession on these grounds:

> [T]he foundation of the acquisition of rights by lapse of time is to be looked for in the position of the person who gains them, not in that of the loser. . . . A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man.

Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 477 (1897).

Notwithstanding the tendency of those trained in economics to view opportunity costs as equivalent to actual expenditures, modern social science research has confirmed the reality of "loss aversion" (the tendency to attach greater value to losses than to foregone gains of equal amount) and the closely related "endowment effect" (the tendency to value already possessed goods more than prospective acquisitions). *See, e.g.*, Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 *J. Econ. Persp.* 193 (1991); Amos Tversky & Daniel Kahneman, *Loss Aversion in Riskless Choice: A Reference-Dependent Model*, 106 Q.J. Econ. 1039 (1991); Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 *J. Pol. Econ.* 1352 (1990); Jack L. Knetsch & J.A. Sinden, *Willingness to Pay and Compensation Demanded: Experimental Evidence of an Unexpected Disparity in Measures of Value*, 99 *Q.J. Econ.* 507, 512-13 (1984). To take one of many illustrations, one study found that duck hunters would pay, on average, $247 to obtain the privilege of keeping a particular wetland undeveloped, but if they already had the right to block development, they would demand an average of $1,044 to give it up. Judd Hammack & Gardner M. Brown, Jr., *Waterfowl and Wetlands: Toward Bioeconomic Analysis* 26 (1974).

Moreover, adverse disruptions in the status quo carry along with them the cost and difficulty associated with adjusting to change. These involve not only direct transition costs but also the costs associated with uncertainty, which manifest themselves in a reluctance to invest human or other capital in an enterprise where the returns could disappear at the drop of a judicial hat.

Disruption is expensive. When a court requires a change in the status quo only to find that its grant of preliminary relief was mistaken and must be undone, the process is twice as disruptive as when the court preserves the status quo on a preliminary basis and later issues a final judgment requiring the change.

The status quo is also relevant to the credibility of the parties' claims of irreparable harm. It is difficult to measure irreparable harm, and either party's willingness to put up with a situation in the past can serve as an indication that the party's injury is not as serious as alleged, or that the party has implicitly consented to the supposed injury. *See Heideman*, 348 F.3d at 1191 ("[T]he City has tolerated nude dancing establishments for many years . . . . This invites skepticism regarding the imperative for immediate implementation [of a new ordinance]."); *Majorica, S.A.* v. *R.H. Macy & Co.*, 762 F.2d 7, 8 (2d Cir. 1985) (noting that while delay alone is not enough to constitute laches, it is ground for doubting a claim of irreparable harm). Plaintiffs, especially, have the burden of complaining of injuries promptly, before defendants come to rely on the status quo. "[E]quity aids the vigilant, not those who slumber on their rights." *Allred* v. *Chynoweth*, 990 F.2d 527, 536 n.6 (10th Cir. 1993); *Standard Oil Co. of N.M.* v. *Standard Oil Co. of Cal.*, 56 F.2d 973, 975 (10th Cir. 1932); *Natural Res. Defendant Council* v. *Pena*, 147 F.3d 1012, 1026 (D.C. Cir. 1998). Thus, when a plaintiff is complaining of irreparable injury from a long-established state of affairs, a court may naturally ask why, if the injury is so pressing as to warrant preliminary relief, the plaintiff waited so long before bringing a claim. 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and*

*Procedure* § 2946, at 113-16 (2d ed. 1995); *Edward & John Burke, Ltd.* v. *Bishop*, 144 F. 838, 839 (2d Cir. 1906); *Savage* v. *Port Reading R.R. Co.*, 67 A. 436, 438 (N.J. Ch. 1907).

The status quo is also a useful reference point because litigants often have incentives to engage in counterproductive strategic behavior. A defendant facing the loss of property, for example, has a natural incentive to extract as much of the value of the land as possible before losing possession, even in ways that limit the land's productivity for years to come. And even when doing so produces no advantages to the defendant, it is an unfortunate reality of human nature that many defendants would prefer to destroy the property in question than to let their adversary have the use of it, both out of spite and as a way of making the resort to the courts less attractive in the first place.

Likewise, plaintiffs have incentives to seek injunctions not only to avert irreparable harm to themselves, but also to impose costs on the other party. This, too, may be done out of spite, or because the higher the costs to the defendant in complying, the more pressure he will feel to "bargain desperately to buy his way out of the injunction." *Am. Hosp. Supply Corp.* v. *Hosp. Prods., Ltd.*, 780 F.2d 589, 594 (7th Cir. 1986). A preliminary injunction aims in part at achieving temporary peace between the parties. However, if it substantially shifts the lines of conflict, it is more likely to function as a weapon in the plaintiff's arsenal than as a cease-fire. Preserving the last peaceable uncontested status of the parties maintains a position to which both parties at least tacitly consented before their dispute, and its concomitant perverse incentives, arose.

Without a heightened standard, these concerns will likely not be given due weight. In the context of the balance of harms analysis, it is all too easy to stop at comparing the absolute magnitudes of the parties' irreparable harms, without distinguishing between foregone gains and actual losses, and without considering whether granting an injunction implicates other institutional concerns about the proper role of the courts. Unless the district court self-consciously takes the nature of the injunction into account by applying a heightened standard, the four factors likely will lead to an overconfident approach to preliminary relief, increasing the cost and disruption from improvidently granted preliminary injunctions.

A particularly important category of cases where the status quo will often be determinative of whether a court should provide preliminary relief is challenges to the constitutionality of statutes. When a statute is newly enacted, and its enforcement will restrict rights citizens previously had exercised and enjoyed, it is not uncommon for district courts to enjoin enforcement pending a determination of the merits of the constitutional issue. *See*, *e.g.*, *Eagle Books*, *Inc.* v. *Ritchie*, 455 F. Supp. 73, 77-78 (D. Utah 1978); *Reproductive Services* v. *Keating*, 35 F. Supp.2d 1332, 1337 (N.D. Okla. 1998); *ACLU* v. *Johnson*, 194 F.3d 1149, 1152 (10th Cir. 1999); *Utah Licensed Beverage Ass'n* v. *Leavitt*, 256 F.3d 1061, 1076-77 (10th Cir. 2001); *Elam Constr., Inc.* v. *Reg'l Transp. Dist.*, 129 F.3d 1343, 1347-48 (10th Cir. 1997) (per curiam). When a statute has long been on the books and enforced, however, it is exceedingly unusual for a litigant who challenges its constitutionality to obtain (or even to seek) a preliminary injunction against its continued enforcement. *See*, *e.g.*, *Walters* v.

*Nat'l Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (Rehnquist, Circuit Justice 1984) ("It would take more than the respondents have presented in their response. . . . to persuade me that the action of a single District Judge declaring unconstitutional an Act of Congress that has been on the books for more than 120 years should not be stayed . . . ."). This is not because the balance of harms to the litigants is different. Presumably, the loss of constitutional rights from enforcement of an old statute is no less harmful or irreparable than from enforcement of a new. The dissent's suggested approach of considering the status quo only insofar as it bears on "the process of balancing the various interests and harms among the parties and the public," (Opinion of Seymour, J., at 7), without a heightened standard, is thus likely to yield the conclusion that it does not matter whether the statute is old or new. That would be a dramatic change in our practice. The reason for weighing the status quo is not to be found in the four preliminary injunction factors. It is rooted, instead, in the institutional concerns we have canvassed above.

I thus join in the en banc court's decision to continue to require litigants seeking a preliminary injunction, that would alter the status quo, to meet a heightened burden of justification.

**II. Does this Preliminary Injunction Satisfy the Heightened Standard?**

This case satisfies even the heightened standard for preliminary injunctions. The applicable statute, the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1(b), sets a most demanding burden of proof for the government: the compelling interest test. The factual findings of the district court, which are not challenged on appeal, make it clear that the government has not

and cannot meet that burden on this record, and that the balance of equities is overwhelmingly in favor of the movant. The en banc majority is therefore right, in my opinion, to affirm the district court's grant of a preliminary injunction.

Plaintiffs establish, and the government does not dispute, that enforcement of the CSA in this context would impose a substantial burden on a sincere exercise of religion. It is common ground that such a burden constitutes irreparable injury. The plaintiffs have thus established a prima facie case (relevant to the probability of success on the merits) and an irreparable injury (relevant to the balance of harms). It is also common ground that the evidence at the hearing regarding the government's assertions of an interest in the health of *hoasca* users and the prevention of diversion to recreational drug users was in "equipoise" and "virtually balanced." What is not common ground is the effect of evenly-balanced evidence regarding possible harms from *hoasca* use on UDV's ultimate likelihood of success on the merits, and on the balancing of the equities required for the grant of a preliminary injunction.

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The dissent insists that the government is more likely to prevail on the merits than is UDV. In Judge Murphy's formulation, the government's interest in the uniform enforcement of drug laws and its interest in full compliance with the obligations imposed by international treaties are sufficient to meet the compelling interest standard. He is silent on whether, even if the government's interests in enforcement and compliance were adjudged compelling, the government has employed the least restrictive means at its disposal, as RFRA requires. 42 U.S.C. § 2000bb-1(b)(2).

The dissent is premised on the view that "RFRA was never intended to result in [a] case-by-case evaluation of the controlled substances laws, and the scheduling decisions made pursuant to those laws . . . . [i]t is particularly improper for the court to assume such a function in this case." Opinion of Murphy, J., at 18. On the contrary, that is precisely what RFRA instructs courts to do. The dissent does not make clear whether it interprets RFRA as precluding "case-by-case evaluation" in all contexts, or whether this is a special rule for controlled substance cases. Neither interpretation is tenable.

In cases where federal law "substantially burdens" the exercise of religion, RFRA requires courts to determine whether "application of the burden" to a specific "person" is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. 42 U.S.C. § 2000bb–1(b) (emphasis added). That cannot be done without a case-by-case evaluation. "Thus, under RFRA, a court does not consider the . . . regulation in its general application, but rather considers whether there is a compelling government reason, advanced in the least restrictive means, to apply the . . . regulation to the individual claimant." *Kikumura* v. *Hurley*, 242 F.3d 950, 962 (10th Cir. 2001) (Murphy, J.). Accordingly, contrary to the dissent, Congress's general conclusion that DMT is dangerous in the abstract does not establish that the government has a compelling interest in prohibiting the consumption of hoasca under the conditions presented in this case.

Nor is there an implied exemption from RFRA in cases involving the controlled substances laws. By its

terms, RFRA applies to "all Federal or State[5] law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after [enactment of RFRA]," unless the law "explicitly excludes such application by reference to this chapter." 42 U.S.C. § 2000bb–3(a), (b). The CSA contains no such explicit exception.

Judge Murphy argues that "courts simply lack the institutional competence to craft a set of religious exemptions to the uniform enforcement" of the drug laws. Opinion of Murphy, J., at 18. But the same may be said for application of RFRA to virtually any field of regulation that may conflict with religious exercise. Whatever our justifiably low opinion of our own competence, we are not free to decline to enforce the statute, which necessarily puts courts in the position of crafting religious exemptions to federal laws that burden religious exercise without sufficient justification.

The dissent's notion that the drug laws are impliedly exempt from RFRA scrutiny is especially surprising in light of the fact that the impetus for enactment of RFRA was the Supreme Court's decision in a case involving the sacramental use of a controlled substance. *See* Congressional Findings and Declaration of Purposes, 42 U.S.C. § 2000bb(a)(4) (criticizing *Employment Division* v. *Smith*, 494 U.S. 872 (1990)). It may well be that most examples of enforcement of the drug laws will satisfy strict scrutiny under RFRA, *see id.* at 903-

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[5] As enacted, RFRA extended to both federal and state law, but as applied to state law, the Supreme Court held that RFRA exceeds the enumerated power of Congress under Section Five of the Fourteenth Amendment. *City of Boerne* v. *Flores*, 521 U.S. 507 (1997). The Act remains constitutional and in effect as applied to federal law. *Kikumura*, 242 F.3d at 958-960.

07 (O'Connor, J., concurring) (applying strict scrutiny to, and upholding, the application of Oregon drug laws to the Native American Church's sacramental use of peyote), but it can scarcely be clearer that Congress intended such scrutiny to occur.

The dissent asserts that courts applying the compelling interest test both before and after RFRA have "routinely rejected religious exemptions from laws regulating controlled substances," and that "the same result should obtain in this case." Opinion of Murphy., J., at 20–21 (citing cases). There is no support in the cases cited, however, for the proposition that any religious use of any drug is outside the scope of RFRA (or, before Smith, free exercise) protection. Four of the five pre-RFRA cases cited involve the same group, the Ethiopian Zion Coptic Church, which advocated the use of marijuana "continually all day, through church services, through everything [they] do." *Olsen* v. *Drug Enforcement Admin.*, 878 F.2d 1458, 1459 (D.C. 1989). The constant and uncircumscribed use of a drug presents different health risks and risks of diversion than the use of *hoasca* suggested by UDV. The significance of these differences is underscored by the conviction of the Ethiopian Zion Coptic Church for the importation of twenty tons of marijuana. *United States* v. *Rush*, 738 F.2d 497, 501 (1st Cir. 1984). The post-RFRA cases cited offer no more support for the proposition that the findings of the CSA will always outweigh the interest in a particular religious use. In *U.S.* v. *Brown*, 1995 WL 732803, *2, for example, the Eighth Circuit found that the "broad use" of marijuana advocated by the church in question, which included supplying the drug to the sick and distributing it to anyone who wished it, including children with parental permission, made accom-

modation impossible. Both the unconstrained character of the proposed use and the popularity of marijuana affected the outcome in these cases: "the vast difference in demand for marijuana on the one hand and peyote on the other warranted the DEA's response [in declining to grant an exception.]" *Olsen* v. *DEA* at 1463–64. These cases accordingly provide very little insight into the appropriate result when the standard required by RFRA is applied to a case involving a tightly circumscribed use of a drug not in widespread use.

Even assuming RFRA's compelling interest test applies, the dissent takes the position that "the government need turn only to express congressional findings concerning Schedule I drugs" to satisfy RFRA scrutiny. Opinion of Murphy, J., at 18. The dissent cites no authority for such an approach, and there is none. Congressional findings are entitled to respect, but they cannot be conclusive. RFRA requires *the government* to "demonstrate[]" that application of a challenged federal law to religious exercise satisfies strict scrutiny under RFRA. 42 U.S.C. § 2000bb-1(b). The term "demonstrates" is defined as "meet[ing] the burdens of going forward with the evidence and of persuasion." *Id.*, §2000bb-2(3). Obviously, Congress contemplated the introduction of "evidence" pertaining to the justification of "application" of the law in the particular instance. If such a burden of proof could be satisfied by citing congressional finding in the preambles to statutes, without additional evidence, RFRA challenges would rarely succeed; congressional findings invariably tout the importance of the laws to which they are appended.

The dissent points to two such congressional findings. First, Congress has made a general finding that the "illegal importation . . . and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people." Opinion of Murphy, J., at 18-19. Second, Congress has placed DMT on the list of Schedule I controlled substances, which implies that it "has high potential for abuse and is not safe to consume even under the supervision of medical personnel." *Id.* These generalized expressions of the government's interest in prohibiting *hoasca* are very similar to the sweeping statements of interest that the Supreme Court found wanting in *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972)—one of the cases to which Congress referred as illustrating the compelling interest test it wished to "restore" by means of RFRA. *See* § 2000bb(b)(1). In that case, the Supreme Court rejected the State of Wisconsin's "contention that its interest in its system of compulsory education is so compelling that even the established religious practices of the Amish must give way":

> Where fundamental claims of religious freedom are at stake, however, we cannot accept such a sweeping claim; despite its admitted validity in the generality of cases, we must *searchingly examine* the interests that the State seeks to promote by its requirement for compulsory education to age 16, and the impediment to those objectives that would flow from recognizing the claimed Amish exemption.

406 U.S. at 221 (emphasis added). A similarly "searching examination" is required here, and can no more be satisfied by quotation of "sweeping claim[s]" in statutory preambles than it could in *Yoder*.

If Congress or the executive branch had investigated the religious use of *hoasca* and had come to an informed conclusion that the health risks or possibility of diversion are sufficient to outweigh free exercise concerns in this case, that conclusion would be entitled to great weight. But neither branch has done that. The two findings on which the dissent relies address the broad question of the dangers of *all* controlled substances, or all Schedule I substances, in the general run of cases. Such generalized statements are of very limited utility in evaluating the specific dangers of *this* substance under *these* circumstances, because the dangers associated with a substance may vary considerably from context to context.

Congress itself recognized this and gave the Attorney General authority to make exemptions from many of the CSA's requirements:

> The Attorney General may, by regulation, waive the requirement for registration of certain manufacturers, distributors, or dispensers *if he finds it consistent with the public health and safety*.

21 U.S.C. § 822(d) (emphasis added). Thus, the CSA itself recognizes that, despite Congress's general findings about Schedule I substances, it may sometimes be "consistent with the public health and safety" to exempt certain people from its requirements. Indeed, the government evidently believed this to be true with respect to the Native American Church's peyote use, since it relied primarily on § 822(d) to authorize its regulation exempting the Native American Church from the CSA. *See* 21 C.F.R. § 1307.31 ("The listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide

religious ceremonies of the Native American Church, and members of the Native American Church so using peyote *are exempt from registration.*" (emphasis added)).

Judge Murphy responds that 21 U.S.C. § 822(d) should not be construed as giving the Attorney General authority to exempt religious groups other than the Native American Church from registration without specific authorization from Congress, because the "government's regulatory exemption for peyote . . . was at all times a product of congressional will." Opinion of Murphy, J., at 24. I think he is wrong about the scope of the Attorney General's authority under § 822(d),[6] but that is not the point. Even if in practice the only religious exemption authorized by § 822(d) were for the Native American Church, the plain text of that provision indicates Congress's belief that at least some use of substances controlled by the Act are "consistent with the public health and safety," despite the generalized congressional finding that any Schedule I substance is not safe to consume even under the supervision of medical personnel. 21 U.S.C. § 812(b)(1)(C). More re-

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[6] The text and legislative history of the CSA suggest that Congress meant to give the Attorney General authority to make other religious exemptions. *See generally Native American Church* v. *United States*, 468 F. Supp. 1247, 1249-51 (S.D.N.Y. 1979) (recounting the legislative history of the exemption for the Native American Church). As Judge Murphy notes, Opinion of Murphy, J., at 24, this precise question was presented in *Olsen* v. *DEA*, 878 F.2d 1458 (D.C. Cir. 1989). In that case, now-Justice Ginsburg refused to accept the DEA's position that it had the authority to exempt the Native American Church but no other churches, noting that the DEA's interpretation preferred one church above others in a way that would raise serious questions concerning the statute's constitutionality. *See id.* at 1461.

cently, Congress has passed legislation requiring the states to allow the Native American Church to use peyote, a Schedule I substance, in religious ceremonies. See American Indian Religious Freedom Act Amendments of 1994, 42 U.S.C. § 1996a. Congress's consistent position has been that concerns for religious freedom can sometimes outweigh risks that otherwise justify prohibiting Schedule I substances. Neither Congress nor the Executive has treated the CSA's general findings about Schedule I substances as precluding a particularized assessment of the risks involved in a specific sacramental use. Neither should we.

Several factors make *hoasca* atypical in its likely health consequences. For instance, although DMT is typically taken intravenously or inhaled in the non-religious settings that Congress presumably had in mind when it proscribed the substance, UDV members ingest it orally. There was some evidence at the hearing that the resulting doses are considerably smaller than typical intravenous or inhaled doses, and there has been very little study of the effects of orally ingested DMT. Furthermore, the fact that *hoasca* is a relatively uncommon substance used almost exclusively as part of a well-defined religious service makes an exemption for bona fide religious purposes less subject to abuse than if the religion required its constant consumption, or if the drug were a more widely used substance like marijuana or methamphetamine. *Cf. Employment Div.* v. *Smith*, 494 U.S. 872, 913-14 (1990) (Blackmun, J., dissenting). These and other differences undermine any claim that, in placing DMT on Schedule I, Congress made a factual finding that should control our assessment of the relative dangerousness of *hoasca*.

Judge Murphy expresses disbelief that a claimant's rights under RFRA could "turn on whether the adherent has a religious affinity for street drugs or more esoteric ones." Opinion of Murphy, J., at 26. Of course it is true that in theory, at least, it is possible to have the same religious interest in shooting heroin as in drinking *hoasca*. But one's rights under RFRA depend not only on the nature of the religious interest but also on the strength of the government's opposed interest. Here, the government's professed interests include avoiding diversion to nonreligious use and ensuring that a multitude of spurious free exercise claims do not hamstring its enforcement efforts. Given those concerns, I do not see why Judge Murphy finds it surprising that the extent of nonreligious use is relevant to the analysis. Indeed, it would be far more surprising if the differences between street drugs and more "esoteric" ones were irrelevant. *See Olsen* v. *DEA*, 878 F.2d 1458, 1464 (D.C. Cir. 1989) (R. Ginsburg, J.) ("[W]e rest our decision [not to grant an exemption for religious marijuana consumption] on the immensity of the marijuana control problem in the United States. . . .").

Finally, the dissent also urges that the government's interest in strict compliance with the 1971 United Nations Convention on Psychotropic Substances, Feb. 21, 1971, 32 U.S.T. 543 (the "Convention") is sufficiently compelling to outweigh the burden imposed on UDV. The district court held that the Convention does not apply to the hoasca tea used by UDV. *O Centro Espirita Beneficiente Uniao Do Vegetal* v. *Ashcroft*, 282 F. Supp. 2d 1236, 1269 (D. New Mexico 2002). Judge Murphy categorically asserts the opposite, based on the "plain language of the Convention." Opinion of Murphy, J., at 30.

To reverse on the basis of the Convention would require us to go far beyond what the record can support. After reviewing the initial briefs filed by the parties, the district court determined that the government's strongest grounds for prohibiting UDV from using *hoasca* were based on concerns about the safety of drinking the tea and the risk of diversion to non-religious uses. 282 F. Supp. 2d at 1266. The court therefore limited evidence to those issues. Plaintiffs attempted to present evidence regarding the interpretation of the Convention by the International Narcotics Control Board, the international enforcing agency, including a letter by the Secretary of the Board stating that hoasca is not controlled under the Convention. The government objected on the ground that "We are now introducing testimony about whether or not ayahuasca is controlled under the International Convention. That is not one of the issues in this hearing." Supp. App. 1634. After discussion, the district court forbade questioning on the subject, and plaintiffs were unable to introduce evidence on the interpretation of the Convention by the Board. For this Court to attempt to interpret a complex treaty on the basis of its "plain language," without the benefit of its interpretive history, would be premature.

More to the point, the government utterly failed to carry its statutory burden (42 U.S.C. § 2000bb-1(b)(2)) of demonstrating that complete prohibition of *hoasca* is the "least restrictive means" of furthering its interest in compliance with the Convention, even assuming the Convention applies. Contrary to the dissent, neither the Convention's terms nor the practice of its interpretation is without flexibility when religious and other constitutional countervailing interests are implicated.

For example, the CSA provides a mechanism by which the government may protest a scheduling decision made under Article 2 of the Convention. When the government receives notice of a scheduling decision pursuant to Article 2 of the Convention, if the requirements demanded are not met by existing controls, the Secretary of State may "ask for a review by the Economic and Social Council of the United Nations" or "take appropriate action under the Convention to initiate proceedings to remove the drug or substance from the schedules under the Convention or to transfer the drug or substance to a schedule under the Convention different from the one specified in the schedule notice." 21 U.S.C. § 811(c)(3)(C)(iii) & (iv). Article 2 of the Convention creates a process for a signatory state to request a reconsideration of a scheduling decision already made, and in considering that request, the Commission is permitted to take into account "economic, social, legal, administrative and other factors it may consider relevant." Article 2 (1), (5), (6). The availability of these procedures suggests that compliance with the Convention is not wholly inconsistent with the needs of signatory states to tailor some scheduling decisions to local requirements.

The Convention allows signatory states at the time of signature, ratification, or accession to make a reservation for indigenous plants traditionally used by "small, clearly determined groups in magical or religious rites." Article 32(4). To interpret the Convention rigidly, as having no possibility of accommodation for new religious groups (or groups newly arriving in the United States), for which no reservation was sought at the time, raises troubling constitutional concerns of denominational discrimination. *See Olsen*, 878 F.2d 1461.

We should not lightly assume this is the correct interpretation of the Convention.

In the case of peyote, as the district court pointed out, 282 F. Supp. 2d at 1268, the United States permits the exportation of the substance to Native American Church groups in Canada, despite the fact that exportation of a Schedule I substance for other than scientific or medical purposes would appear to violate the Convention.[7] This suggests that, in practice, there is room for accommodation of the legitimate needs of religious minority groups.

RFRA places the burden on the government to demonstrate that application of the law to the particular religious exercise is the least restrictive means of furthering its interest. As far as the government's argument and the record reveal, the government has undertaken no steps to inquire regarding the status of *hoasca* or to work with the Economic and Social Council or the International Narcotics Control Board to find an acceptable accommodation. Rather, it has posited an unrealistically rigid interpretation of the Convention, attributed that interpretation to the United Nations, and then pointed to the United Nations as its excuse for not even making an effort to find a less restrictive approach.

To be sure, treaty compliance might well implicate governmental interests beyond the health and safety interests considered above. For example, if it could be shown that if the United States failed to proscribe *hoasca*, another country would seize upon that as an ex-

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[7] Peyote use by Native American Church groups within the United States is permitted by an express reservation to the Convention.

cuse to refuse to proscribe another controlled substance of great importance to our national well-being, that might well constitute a compelling interest. But there is no way to know whether that is so without asking.

The government submitted the affidavit of one State Department lawyer stating in general terms that non-compliance with the treaty would interfere with the ability of the United States to demand cooperation from other nations. But while some level of deference to Congressional and Executive findings is appropriate in the context of foreign relations, this affidavit does not provide any information specific enough to be relevant in assessing the damage that would flow from an exemption for the UDV. Presumably that lawyer did not mean to say that all violations, from the smallest infraction to blatant disregard for the treaty as a whole, are equally damaging to the diplomatic interests of the United States. He made no mention of whether the International Narcotics Control Board deems *hoasca* to be within the Convention or whether there may be ways to comply with the Convention without a total ban. Had the government presented an affidavit about the particular harms that this particular infraction would cause, it might be a different matter. *See Ashcroft*, 124 S. Ct. at 2794; *Sable Communications* v. *FCC*, 492 U.S. 115, 130 (1989) (dismissing conclusory statements that a complete ban on dial-a-porn messages was necessary to protect children because "the congressional record . . . contain[ed] no evidence as to how effective or ineffective" less restrictive alternatives would be).

**B**

Even if UDV were likely to prevail on the merits, the dissent believes this to be one of those rare cases in

which the balancing of the equities would dictate that the injunction not issue. *See* Opinion of Murphy, J., at 46. The disagreement rests, I think, on whether the statutory policies and burdens of proof set forth in RFRA should guide our consideration of each of the four preliminary injunction factors—or are relevant only to the first, the probability of success on the merits. I believe Judge Murphy's dissent is wrong to disregard RFRA in balancing the equities. That is not because RFRA implicitly modifies the standards that apply to preliminary injunctions; I agree the normal standards remain in place unless Congress clearly manifests an intent to modify them. *See Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 320 (1982). Rather, the point is that the normal standards for injunctive relief require courts to weigh the private and public interests in free exercise on the one hand against the government's interests in regulation on the other, and RFRA is relevant to that weighing. When Congress has expressed its view of the proper balance between conflicting statutory policies, it is incumbent upon the courts to give effect to that view:

> 'Balancing the equities' when considering whether an injunction should issue, is lawyers' jargon for choosing between conflicting public interests. When Congress itself has struck the balance, has defined the weight to be given the competing interests, a court of equity is not justified in ignoring that pronouncement under the guise of exercising equitable discretion.

*Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 609-610 (1952) (Frankfurter, J., concurring).

By "restor[ing" the compelling interest test of *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), 42 U.S.C. § 2000bb(b)(1), RFRA expressed Congress's judgment that the free exercise of religion outweighs all but the most compelling governmental interests. *See* 42 U.S.C. § 2000bb-1; *Yoder*, 406 U.S. at 215 ("The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."). Once the plaintiff has established a prima facie case, RFRA places on the government the burden of demonstrating that application of the law is the least restrictive means of furthering its interest. 42 U.S.C. § 2000bb-1(b).[8] It is not that RFRA "legislatively overrule[s]" the traditional principle that the moving party bears the burden of establishing the four preliminary injunction factors. *See* Opinion of Murphy, J., at 46. Rather, RFRA speaks to the quality

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[8] In the free exercise/RFRA context, it is important to note that evidence of a compelling government interest rebuts the plaintiff's prima facie case not by disputing the plaintiff's interest in the religious practice but by outweighing it. Not all burden-shifting regimes share this feature. For instance, in the Title VII context, once a plaintiff is able to show disparate treatment of a similarly situated employee of another race, the burden shifts to the employer to show a nondiscriminatory motive for the differing treatment. To the extent that an employer makes such a showing, it does not present considerations that *outweigh* the plaintiff's interest in a nondiscriminatory workplace; rather, it *undercuts* the plaintiff's claim of discrimination. Thus, if an employer's case for a nondiscriminatory motive is in equipoise, then it follows that the plaintiff's case for discrimination is also in equipoise. In that context, the dissent's view of the consequences of equipoise as to the government's showing is well-founded; in the RFRA context, it seems mistaken.

of evidence and nature of the interest that the government must put forward. RFRA makes it clear that only demonstrated interests of a compelling nature are sufficient to justify substantial burdens on religious exercise. Mere "equipoise" with respect to not-necessarily-compelling governmental interests is not enough.

Thus, the dissent is wrong to assume that, with the evidence of the government's interest in "equipoise," the plaintiff "has not carried its burden of demonstrating that the third and fourth preliminary injunction factors . . . weigh in its favor." *See* Opinion of Murphy, J., at 17. The government's evidence, on this record, demonstrates only that there might be some adverse health consequences or risks of diversion associated with UDV's *hoasca* consumption. *See* Gov't Br. 45 (describing the government's interest as an interest in prohibiting substances that are "just as likely to be dangerous as . . . safe"). But under RFRA, mere possibilities, based on limited evidence supplemented by speculation, are insufficient to counterbalance the certain burden on religious practice caused by a flat prohibition on *hoasca*. *See United States* v. *Hardman*, 297 F.3d 1116, 1130 (10th Cir. 2002) (en banc); *Sherbert*, 374 U.S. at 407.

In effect, the dissent attempts to make an end run around RFRA's reinstatement of strict scrutiny by repackaging all of the arguments that would be relevant to the merits (where the presumption of invalidity would clearly apply) as arguments about the equities (where it is disregarded). That approach is unprecedented. When the government fails to demonstrate its compelling interest in burdening a constitutional right, courts routinely find that, in the absence of a compelling

justification for interference, the balance of harms and public interest also favor protecting the moving party's burdened rights. *See*, *e.g.*, *Fifth Ave. Presbyterian Church* v. *City of New York*, 293 F.3d 570, 576 (2d Cir. 2002) (affirming the grant of a preliminary injunction because the City "ha[d] not sufficiently shown the existence of a relevant law or policy . . . that would . . . justify its actions in dispersing the homeless from the Church's landings and steps" (emphasis added)); *Jolly* v. *Coughlin*, 76 F.3d 468, 482-83 (2d Cir. 1996) (applying a heightened standard but nevertheless upholding a RFRA-based preliminary injunction because the plaintiff had established a prima facie case and the government had not established that its policy was the least restrictive means of furthering a compelling interest); *Eisenberg ex rel. Eisenberg* v. *Montgomery County Public Schools*, 197 F.3d 123, 127 n.11, 133 (4th Cir. 1999) (reversing the denial of a preliminary injunction because the school district had not presented evidence sufficient to rebut the strict-scrutiny presumption that race-based decisions are invalid). *See also Stuart Circle Parish* v. *Bd. of Zoning Appeals*, 946 F. Supp. 1225, 1235-36, 1240 (E.D. Va. 1996) (finding that because plaintiffs demonstrated a substantial likelihood of success on their RFRA claim, their interest in religious freedom tipped the balance of harms and the public interest in their favor); *Luckette* v. *Lewis*, 883 F. Supp. 471, 483 (D. Ariz. 1995) (balance of harms weighed sharply in favor of prisoner given that his religious exercise was burdened and defendants had not demonstrated a countervailing public interest); *Howard* v. *United States*, 864 F. Supp. 1019, 1029 (D. Colo. 1994) (in light of likelihood of success, public interest in protecting First Amendment rights outweighed any possible harm to the government); *McCormick* v. *Hirsch*,

460 F. Supp. 1337, 1350 (M.D. Pa. 1978), abrogated on other grounds, *see Bakery, Confectionery and Tobacco Workers' Int'l Union, Local 6* v. *NLRB*, 799 F. Supp. 507, 511 (E.D. Pa. 1992) ("When the protection of First Amendment liberties are [*sic*] involved, little else need be said of balancing the public interest, as protection of these rights is the most fundamental.").[9]

If there was any doubt before, the Supreme Court's recent opinion in *Ashcroft* v. *ACLU*, 124 S. Ct. 2783 (2004), forecloses the dissent's approach. Like this case, *Ashcroft* involved a preliminary injunction in which the merits were governed by the compelling interest/least restrictive means test. The issue there was the constitutionality of the Children's Online Protection Act, ("COPA"), which requires businesses posting certain sexually explicit content on the web to require viewers to submit information verifying their age before they could access the materials. *See id.* at 2789-90. The main question was whether that means of keeping the content away from children was the least restrictive means, as compared with other methods (prominently, making internet filtering programs more readily available to parents). As in our case, there was evidence on both sides, and substantial factual questions remained about the relative effectiveness of the two alternatives. *See id.* at 2794. On that record, the Court found that the plaintiffs were likely to succeed primarily because the burden of proof was allocated to the

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[9] The dissent argues that the right at issue in this case is statutory, rather than constitutional, making several of the cases cited above inapposite. Opinion of Murphy, J., at 45–46 n.17. But RFRA dictates that the government must meet the same exacting standard as when it seeks to justify a burden on a constitutional right.

government. *See id.* at 2791, 2793 (noting that movants had no burden to demonstrate the effectiveness of alternative means of serving the government's interest; the government bore the burden of proving that other alternatives were less effective than COPA).

By the dissent's logic, the Court should have gone on to reverse the district court's preliminary injunction on the theory that with respect to the balance of harms and public interest prongs, it was not the government but the plaintiffs who bore the burden of proving that the COPA regime was not the least restrictive means of serving the government's interests. In fact the Court did quite the opposite. In affirming the preliminary injunction, the Court had this to say about the equities supporting the injunction:

> As mentioned above, there is a serious gap in the evidence as to the effectiveness of filtering software. . . . For us to assume, without proof, that filters are less effective than COPA would usurp the District Court's factfinding role. By allowing the preliminary injunction to stand and remanding for trial, we require the Government to shoulder its full constitutional burden of proof respecting the less restrictive alternative argument, rather than excuse it from doing so.

*See id.* at 2794. The Court thus held that even with regard to the balance of harms, the government must "shoulder its full constitutional burden of proof respecting the less restrictive alternative argument."[10] *Id.*

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[10] The dissent complains that this passage "does not relate in any fashion" to the balance of the harms or public interest factors. Opinion of Murphy, J., at 47. This is not correct. The Court referred to "important practical reasons to let the injunction stand

Under controlling Supreme Court precedent, therefore, we cannot "excuse" the government from meeting its burden simply by shifting the analysis from the likelihood of success to the equities.

**C**

Even putting aside any special features of RFRA or strict scrutiny more generally, there is a more basic problem with the dissenters' approach. While Judge Murphy is correct to insist that UDV carry its burden with regard to each of the four factors of the preliminary injunction test, he underestimates the significance of the likelihood of success on the remaining factors, thereby misconceiving the relationship between the four preliminary injunction factors. A primary purpose of the balance-of-harms inquiry is to determine the relative cost of an error favoring one side as compared with an error favoring the other. *See*, *e.g.*, *Ashcroft*, 2004 WL 1439998 at *9 (noting that "the potential harms from reversing the injunction outweigh those of leaving it in place by mistake"); *Tri-State Generation & Transmission Ass'n, Inc.* v. *Shoshone River Power, Inc.*, 805 F.2d 351, 358 (10th Cir. 1986) ("In essence, it would be easier to correct a mistake in favor of Tri-State in issuing an injunction than it would be to correct a mistake in favor of Shoshone and Pacific by not issuing it."). It follows that the balance-of-harms inquiry

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pending a full trial on the merits." The first of these was that "the potential harms from reversing the injunction outweigh those of leaving it in place by mistake." *Ashcroft*, 124 S. Ct. at 2794. But the principal point is what the Court did not do—it did not, as Judge Murphy says we should—treat the plaintiffs as not having met their burden of proof on the balances of equities where the same evidence had been held sufficient to establish that they were likely to prevail on the merits under a compelling interest test.

depends in part on the merits inquiry, since the only way of assessing whose harms are likely to be *erroneously* imposed is to judge them in light of the likelihood of success on the merits. Thus, no matter how great the interim harm to UDV if it is prevented from using *hoasca* until the final resolution of this case, that harm must be discounted to the extent that it is likely that UDV will not ultimately prove entitled to use *hoasca*; by the same token, no matter how great the interim harm to the government if it is wrongfully forced to allow the UDV to use and import hoasca, that harm must be discounted by the likelihood that UDV will ultimately prevail. *Cf.* Opinion of Seymour, J., at 8-9.

Although not always explicitly, courts commonly evaluate the balance of harms in light of the likelihood of success. *See*, *e.g.*, *Abbott Labs.* v. *Mead Johnson & Co.*, 971 F.2d 6, 12 & n.2 (7th Cir. 1992); *Star Fuel Marts, LLC* v. *Sam's East, Inc.*, 362 F.3d 639, 652 (10th Cir. 2004) (downplaying the harm to the defendant because the defendant had not rebutted the plaintiff's *prima facie* case on the merits, and therefore the preliminary injunction required the defendant to do no more than it was legally obligated to do). It may be possible, as the dissent suggests, for the harm and public interest factors to favor the party likely to lose on the merits so strongly that the (likely) losing party should succeed at the preliminary injunction stage. Such an outcome is highly unlikely, however, when the merits determination hinges on the strength of the governmental interest. In such cases, it is to be expected that the merits and the balance of equities would overlap. If the government's interest is not strong enough to outweigh the plaintiff's interest in

religious exercise for purposes of the merits, it is highly unlikely to do so for purposes of the balance of harms.

**D**

Besides insisting that UDV has not met its supposed burden of disproving the government's interest, Judge Murphy's dissent also suggests several substantive reasons for finding that the balance of harms favors the government. First, he relies on the government's general interest in enforcing the law. *See* Opinion of Murphy, J., at 40-41, quoting *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (Rehnquist, Circuit Justice 1977). However, we must not forget that this case involves the intersection of two Acts of Congress of equal dignity: RFRA and the CSA. As a result, the government's interest in complying with the law cuts both ways: the government has no less interest in obeying RFRA than it has in enforcing the CSA. Whether the public interest in enforcing the law favors accommodation under RFRA or strict application of the CSA *depends* on whether there is a compelling interest that requires strict enforcement of the latter. It would be circular to rely on that interest to establish the government's compelling interest in the first place.

The government also stresses its interest in uniform enforcement of the law and avoiding the burdens of case-by-case management of religious exemptions, raising concerns that if UDV is allowed an exemption in this case, it will make enforcement of the CSA (and the Convention) unworkable by encouraging a host of spurious claims for religious drug use. I find the panel opinion's reasons for skepticism on this front convincing. *See O Centro Espirita Beneficiente Uniao do Vegetal* v. *Ashcroft*, 342 F.3d 1170, 1186 (10th Cir.

2003). In any event, it is most unlikely that those fears will materialize during the pendency of a preliminary injunction. Assuming the government is entitled to enforce the CSA, a final judgment in its favor will serve as adequate discouragement for future claims similar to UDV's. If the government is serious about the dangers, it can always seek expedited treatment of this case on the merits, and prove its case to the district court.

Finally, even when the government is able to demonstrate a compelling interest under RFRA, it remains necessary to establish that there is no other way of furthering that interest that would have less impact on the religious exercise. *See Yoder*, 406 U.S. at 215 (requiring the government's interest to be one "not otherwise served"); 42 U.S.C. § 2000bb-1(b)(2). Thus, although the parties spend the bulk of their efforts arguing about whether the government has a compelling interest in prohibiting UDV's use of *hoasca*, that is only part of the analysis. In *United States* v. *Hardman*, when this Court applied RFRA to a statutory scheme that allowed Native American tribe members to possess eagle parts but denied access to other practitioners of Native American religion, the Court en banc held that the government could not prevail without presenting evidence about the effects of alternative, less restrictive approaches on the compelling government interests in question. 297 F.3d at 1132. "[W]e must first determine where along [the continuum of policy alternatives] the government's present solution lies, and where other, less restrictive means would lie." *Id.* at 1135.

This case, like *Hardman*, raises the question of why an accommodation analogous to that extended to the

Native American Church cannot be provided to other religious believers with similar needs. As the panel majority noted, the apparent workability of the accommodation for Native American Church peyote use strongly suggests that a similar exception would adequately protect the government's interests here. *See O Centro*, 342 F.3d at 1186. The preliminary injunction issued in this case allows the government some degree of control over UDV's importation, storage, and use of hoasca. At least to some extent, then, the preliminary injunction works a compromise, attempting to respond to the government's legitimate concerns while still allowing UDV to continue its religious activity. It is incumbent on the government to show why no such compromise regime could adequately serve its interests.

**E**

All told, this is the unusual case in which the plaintiff not only prevails on each of the four preliminary injunction factors, but does so with sufficient clarity that a preliminary injunction is warranted even though it would disturb the status quo. The dissent does not challenge that the plaintiff would suffer serious and irreparable injury from continued prohibition of its religious sacrament. With the burden on the government to prove that its interest in enforcing the CSA against religious *hoasca* use is compelling but the evidence in support of that interest no better than "in equipoise," the plaintiff has also demonstrated a likelihood of success on the merits. The same state of the record demonstrates conclusively that the plaintiff prevails on the other two factors. With a proven interest of high order on one side, and mere uncertainty, or "equipoise," on the other, the balance of equities is plainly in the plaintiff's favor. And in light of Con-

gress's determination that the public interest is served by accommodating the free exercise of religion except in cases of a proven compelling governmental interest, the plaintiff prevails on the "public interest" prong as well.

In conclusion, courts should issue preliminary injunctions that disturb the status quo only when the traditional balance is strongly in the plaintiff's favor, but on this record, plaintiff UDV has satisfied that demanding test.

**HARTZ**, Circuit Judge, dissenting:

I dissent, with great respect for the opinions that hold otherwise.

I join Part I of Judge Murphy's dissent and Part I of Judge McConnell's concurrence. I agree that the status quo is an important consideration and that Judge Murphy has properly analyzed where the status quo lies in this case. I should add, however, that, as with all balancing tests, our form of words in expressing the test is of minimal utility. District courts will continue to consider the factors we list and reach the result they believe to be equitable; and we, observing proper deference, will generally affirm.

In applying the balancing test, I believe that the principal reason for reversing the preliminary injunction is the unlikelihood that UDV will ultimately prevail on the merits. Applying pre-*Smith* Supreme Court precedent (as RFRA requires), it is likely that the ultimate determination will be that there is a compelling interest in uniform application of the Controlled Substances Act. *See Employment Div. v. Smith*, 494 U.S. 872, 905 (1990) (O'Connor, J., concurring). Moreover, it is even more likely to be determined that there is a compelling interest in full compliance with the 1971 United Nations Convention on Psychotropic Substances, which would be violated by permitting the UDV's use of hoasca. *See O Centro Espirita Beneficiente Uniao De Vegetal v. Ashcroft*, 314 F.3d 463 (10th Cir. 2002).

**APPENDIX B**

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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No. 02-2323

O CENTRO ESPIRITA BENEFICIENTE UNIAO DO VEGETAL, ALSO KNOWN AS UNIAO DO VEGETAL (USA), INC., A NEW MEXICO CORPORATION ON ITS OWN BEHALF AND ON BEHALF OF ALL ITS MEMBERS IN THE UNITED STATES; JEFFREY BRONFMAN, INDIVIDUALLY AND AS PRESIDENT OF UDV-USA; DANIEL TUCKER, INDIVIDUALLY AND AS VICE-PRESIDENT OF UDV-USA; CHRISTINA BARRETO, INDIVIDUALLY AND AS SECRETARY OF UDV-USA; FERNANDO BARRETO, INDIVIDUALLY AND AS TREASURER OF UDV-USA; CHRISTINE BERMAN; MITCHEL BERMAN; JUSSARA DE ALMEIDA DIAS, ALSO KNOWN AS JUSSARA ALMEIDA DIAS; PATRICIA DOMINGO; DAVID LENDERTS; DAVID MARTIN; MARIA EUGENIA PELAEZ; BRYAN REA; DON ST. JOHN; CARMEN TUCKER; SOLAR LAW, INDIVIDUALLY AND AS MEMBERS OF UDV-USA,
PLAINTIFFS-APPELLEES

*v.*

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES; ASA HUTCHINSON, ADMINISTRATOR OF THE UNITED STATES DRUG, ENFORCEMENT ADMINISTRATION; PAUL H. O'NEILL, SECRETARY OF THE DEPARTMENT OF TREASURY OF THE UNITED STATES; DAVID C. IGLESIAS, UNITED STATES ATTORNEY FOR THE DISTRICT OF NEW MEXICO; DAVID F. FRY, RESIDENT SPECIAL AGENT IN CHARGE OF THE UNITED STATES CUSTOMS SERVICE OFFICE OF CRIMINAL INVESTIGATION IN ALBUQUERQUE, NEW MEXICO; ALL IN THEIR OFFICIAL CAPACITIES,
DEFENDANTS-APPELLANTS

CHRISTIAN LEGAL SOCIETY; THE NATIONAL ASSOCIATION OF THE EVANGELICALS; CLIFTON KIRKPATRICK, AS THE STATED CLERK OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A.); QUEENS FEDERATION OF CHURCHES,
AMICUS CURIAE

[Filed: Sept. 4, 2003]

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO (D.C. No. CIV-00-1647 JP/RLP)**

Before: **SEYMOUR, PORFILIO**, and **MURPHY**, Circuit Judges.

**PORFILIO**, Senior Circuit Judge.

John Ashcroft, Attorney General of the United States, et al., appeal an order in the United States District Court for the District of New Mexico preliminarily enjoining the government from prohibiting or penalizing the sacramental use of *hoasca*, a substance containing dimethyltryptamine (DMT), a drug listed in Section I of the Controlled Substances Act (CSA), 21 U.S.C. §§ 801-904, by O Centro Espirita Beneficiente Uniao do Vegetal, a small religious organization. We affirm.

Uniao do Vegetal, President of the Uniao do Vegetal's United States chapter Jeffrey Bronfman, and several other church members (collectively, UDV) filed a Complaint for Declaratory and Injunctive Relief and a Motion for Preliminary Injunction against the United States Attorney General, United States Attorney for the District of New Mexico, the Drug Enforcement

Administration (DEA), the United States Customs Service, and the Department of the Treasury (collectively, Government), alleging violation of the First, Fourth, and Fifth Amendments, Equal Protection principles, the Administrative Procedure Act (APA), international laws and treaties, and the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-1. UDV sought declaratory and preliminary injunctive relief against the Government's penalty or prohibition of the church's importation, possession, and use of *hoasca* and against any attempt to seize the drug or prosecute Uniao do Vegetal members.

After a two-week hearing, on August 12, 2002, the district court granted UDV's motion for a preliminary injunction in a [*sic*] unpublished Memorandum Opinion and Order.[1] The court rejected UDV's arguments that *hoasca* is not covered under the CSA and prohibiting the importation, possession, and use of the drug violates the Constitution and international law. However, the court held UDV had advanced a successful RFRA claim.

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[1] The district court rejected UDV's motion for preliminary injunction based on its Equal Protection claim in a February 25, 2002 order. In the August 12, 2002 order, the court held the CSA is a neutral law of general applicability, controlling drug consumption of religious and recreational users alike with the broad goal of protecting public health. The court rejected UDV's argument that *hoasca* is not listed in Schedule I of the CSA. Additionally, the court rejected UDV's argument that given the exemption to Brazilian drug laws for religious consumption of *hoasca*, principles of comity suggest the court should sanction sacramental use in this country. Finding the claims under the APA, the Fourth Amendment, and the Fifth Amendment primarily concern questions about the type of relief warranted, the court deferred ruling on these claims.

For purposes of the preliminary injunction, the Government did not dispute UDV had established a prima facie case under RFRA—a substantial burden imposed by the federal government on a sincere exercise of religion. *See Kikumura* v. *Hurley*, 242 F.3d 950, 960 (10th Cir. 2001).[2] The burden therefore shifted to the Government to show "the challenged regulation furthers a compelling interest in the least restrictive manner." *See* 42 U.S.C. § 2000bb-1(b); *United States* v. *Meyers*, 95 F.3d 1475, 1482 (10th Cir. 1996). The Government asserted three compelling interests in prohibiting *hoasca*: protection of the health and safety of Uniao do Vegetal members; potential for diversion from the church to recreational users; and compliance with the 1971 United Nations Convention on Psychotropic Substances (Convention). Convention on Psychotropic Substances, opened for signature Feb. 21, 1971, 1019 U.N.T.S. 175 (ratified by the United States in 1980) [hereinafter Convention].

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[2] Note that UDV's establishment of a prima facie RFRA violation, standing alone, would have sufficed to demonstrate "a substantial likelihood of success on the merits," the first of four factors courts consider in granting a preliminary injunction. *Kikumura* v. *Hurley*, 242 F.3d 950, 955 (10th Cir. 2001). In *Kikumura*, we held, "[b]ecause Plaintiff's request for pastoral visits appear at this initial stage of the litigation to be a protected religious exercise, and because Defendants do not challenge the sincerity of Plaintiff's religious beliefs, Plaintiff need only prove that the denial of the pastoral visits was a 'substantial burden' on his 'exercise of religion' in order to show a substantial likelihood of success on the RFRA claim." *Id.* at 961. Nevertheless, UDV's counter-evidence on the Government's alleged compelling interests serves as proof that the balance of harms and public interest, preliminary injunction factors three and four, tip in their favor.

The district court required the Government to prove sacramental *hoasca* consumption poses a serious health risk to Uniao do Vegetal members and, if sanctioned, would lead to significant diversion to non-religious use. Finding evidence on the health risks to UDV members "in equipoise," evidence on risk of diversion "virtually balanced," and *hoasca* not covered by the Convention, the court held the Government failed to meet its "onerous burden" under RFRA. Because it found no compelling government interests, the court did not conduct a least restrictive means analysis.

The district court concluded UDV demonstrated "substantial likelihood of success on the merits" and satisfied the other three requirements for preliminary injunction. First, on irreparable injury, the court noted, "Tenth Circuit law indicates that the violations of religious exercise rights protected under the RFRA represent irreparable injuries." Second, on balance of harms, the court held, "in light of the closeness of the parties' evidence regarding the safety of *hoasca* use and its potential for diversion, the scale tips in the Plaintiffs' favor." Finally, the court reasoned failure to vindicate religious freedom protected under RFRA—a statute specifically enacted by Congress, as representative of the public, to countermand a Supreme Court ruling—would be adverse to the public interest.

In an order dated November 12, 2002, the court delineated a remedy, preliminarily enjoining the Government from prohibiting or penalizing sacramental *hoasca* use by Uniao do Vegetal members. The court also required that the church, upon demand by the DEA, identify its members who handle *hoasca* outside of ceremonies, allow for on-site inspections and inven-

tories, provide samples, identify times and locations of ceremonies, and designate a liaison to the DEA.

The Government moved for an emergency stay of the preliminary injunction pending appeal. On December 12, 2002, we granted the stay, holding UDV failed to demonstrate "clear and equivocal" right to relief. *O Centro Espirita* v. *Ashcroft*, 314 F.3d 463, 467 (10th Cir. 2002).

On appeal, UDV urged us to affirm the district court, contending the Government failed to prove *hoasca* poses health risks to church members, the Convention does not apply to *hoasca*, and Uniao do Vegetal's consumption of *hoasca* is comparable to the Native American Church's exempted use of peyote. Calling for a reversal, the Government's appeal focused on the compelling interests asserted below.

## I. Background

### A. Uniao do Vegetal

Uniao do Vegetal, a syncretic religion of Christian theology and indigenous South American beliefs, was founded in Brazil in 1961 by a rubber-tapper who discovered the sacramental use of *hoasca* (the Portuguese transliteration of ayahuasca) in the Amazon rainforests. A highly structured organization with elected administrative and clerical officials, UDV uses *hoasca*, which in the Quechua Indian language means "vine of the soul," "vine of the dead," or "vision vine," as a link to the divinities, a holy communion, and a cure for ailments physical and psychological. Church doctrine dictates members can perceive and understand God only by drinking *hoasca*. Brazil, in which there are about 8,000 Uniao do Vegetal members, recognizes Uniao do Vegetal as a religion and exempts sacramen-

tal use of *hoasca* from its prohibited controlled substances. *Hoasca* is ingested at least twice monthly at guided ceremonies lasting about four hours. Rituals during Uniao do Vegetal service include the recitation of sacred law, singing of chants by the leader, question-and-answer exchanges, and religious teaching.

Uniao do Vegetal has been officially in the United States since 1993, when its highest official visited and founded a branch in Santa Fe, New Mexico, subordinate to the Brasilia headquarters. Approximately 130 Uniao do Vegetal members currently reside in the United States, thirty of which are Brazilian citizens. The Internal Revenue Service has granted Uniao do Vegetal tax exempt status.

*Hoasca* is made by brewing together two indigenous Brazilian plants, *banisteriopsis caapi* and *psychotria viridis*. *Psychotria* contains DMT; *banisteriopsis* contains harmala alkaloids, known as beta-carbolines, that allow DMT's hallucinogenic effects to occur by suppressing monoamine oxidase enzymes in the digestive system that otherwise would break down the DMT. Ingestion of the combination of plants allows DMT to reach the brain in levels sufficient to significantly alter consciousness.

Because the plants do not grow in the United States, *hoasca* is prepared in Brazil by Church officials and exported to the United States. On May 21, 1999, United States Customs Service agents seized a shipment of *hoasca* labeled "tea extract" bound for Jeffrey Bronfman and Uniao do Vegetal-United States. A subsequent search of Mr. Bronfman's residence resulted in the seizure of approximately 30 gallons of *hoasca*. Although the government has not filed any criminal charges stemming from church officials' possession of

*hoasca*, it has threatened prosecution; accordingly, Uniao do Vegetal has ceased using the tea in the United States.

**B. Legislation**

The Controlled Substances Act makes it unlawful to "manufacture, distribute, dispense, or possess with intent to manufacture, distribute, or dispense" any controlled substance, "except as authorized" by the Act. 21 U.S.C. § 841(a)(1). Possession is also criminalized except as authorized. *Id.* § 844(a).

The CSA classifies controlled substances according to five schedules, based on required findings of a drug's safety, the extent to which it has an accepted medical use, and its potential for abuse. Schedule I, the most restrictive list, encompasses drugs with a "high potential for abuse," "no currently accepted medical use in treatment in the United States," and "a lack of accepted safety for use of the drug or other substance under medical supervision." *Id.* § 812(b)(1)(A)-(C). Included in Schedule I is "any material, compound, mixture, or preparation which contains any quantity of the following hallucinogenic substances," including DMT. *Id.* § 812. No individual or entity may distribute or dispense a Schedule I controlled substance except as part of a strictly controlled research project registered with the DEA and approved by the Food and Drug Administration, or for limited industrial purposes excluding human consumption of the substance. *Id.* § 823(f).

The 1971 United Nations Convention on Psychotropic Substances embodies an international effort "to prevent and combat abuse of [psychotropic] substances and the illicit traffic to which it gives rise." Convention,

Preamble. The treaty classifies substances according to their degree of safety and medical usefulness, with Schedule I representing substances, including DMT, that are particularly unsafe and lack any medical use. Parties to the Convention, more than 160 nations in all, must "[p]rohibit all use except for scientific and very limited medical purposes." *Id.* Art. 7(a).

The Convention also bans unauthorized import and export of the substances and provides, "a preparation is subject to the same measures of control as the substance which it contains." *Id.* Art. 3(1). With respect to religious use of Schedule I substances, the Convention allows signatories to make "reservations" exempting a substance from the provisions of Article 7 under the following circumstances:

> A State on whose territory plants are growing wild which contain psychotropic substances from among those in Schedule I and which are traditionally used by certain small, clearly determined groups in magical or religious rights, may, at the time of signature, ratification, or accession, make reservations concerning these plants, in respect of the provisions of article 7, except for provisions relating to international trade.

*Id.* Art. 32(4). Under this provision, the United States made a reservation for Native American religious use of peyote. Neither the United States nor Brazil has made a reservation for DMT.

The First Amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. *Employment Division, Dep't of Human Resources* v. *Smith* held the Free Exercise Clause did not require

Oregon to exempt from its criminal drug laws the sacramental ingestion of peyote by members of the Native American Church. 494 U.S. 872, 885-890 (1990). Generally applicable laws, the Court concluded, may be applied to religious exercises regardless of whether the Government demonstrates a compelling interest for its rule. *Id.* By contrast, a law that is not neutral and not generally applicable "must be justified by a compelling government interest and must be narrowly tailored to advance that interest." *Church of the Lukimi Babula Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 531-32 (1993).

The Religious Freedom Restoration Act, enacted after *Smith*, provides:

> (a) In general
>
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Exception
>
> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.
>
> (c) Judicial Relief
>
> A person whose religious exercise has been burdened in violation of this section may assert

> that violation as a claim . . . in a judicial proceeding and obtain appropriate relief against a government.

42 U.S.C. § 2000bb-1. RFRA restores the pre-*Smith* compelling interest test espoused in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). Congress explicitly stated, "the term 'demonstrates' means meets the burden of going forward with the evidence and of persuasion." 42 U.S.C. § 2000bb-2.

Following Congress' passage of RFRA, the Supreme Court found it unconstitutional as applied to the states. *City of Boerne* v. *Flores*, 521 U.S. 507, 519 (1997). However, because we held RFRA is binding on the federal government, *Kikumura*, 242 F.3d at 959, pre-*Boerne* case law is applicable here.

**II. Analysis**

"This court reviews the grant of a preliminary injunction for abuse of discretion," which occurs when a district court "commits an error of law, or is clearly erroneous in its preliminary factual findings." *Dominion Video Satellite, Inc.* v. *EchoStar Satellite Corp.*, 269 F.3d 1149, 1153 (10th Cir. 2001) (citation omitted). We review a district court's decision on whether an interest qualifies as "compelling," a question of law, de novo. *United States* v. *Hardman*, 297 F.3d 1116, 1120, 1127 (10th Cir. 2002). Although we have not ruled on the appropriate standard of review for a district court's analysis of "least restrictive means," *id.* at 1130, we review de novo the "ultimate determination as to whether the RFRA has been violated." *Meyers*, 95 F.3d at 1482. Likewise, we consider de novo the interpretation of the Convention. See *Utah* v. *Babbitt*, 53 F.3d 1145, 1148

(10th Cir. 1995). We review factual findings underlying the district court's legal conclusions for clear error. *Hardman*, 297 F.3d at 1120.

The standard for a preliminary injunction is well known. A court will grant a preliminary injunction if a plaintiff shows "(1) a substantial likelihood of success on the merits of the case; (2) irreparable injury to the movant if the preliminary injunction is denied; (3) the threatened injury to the movant outweighs the injury to the other party under the preliminary injunction; and (4) the injunction is not adverse to the public interest." *Kikumura*, 242 F.3d at 955.

If a preliminary injunction alters the status quo, a plaintiff must "show that on balance, the four [preliminary injunction] factors weigh heavily and compellingly in [its] favor." *SCFC ILC, Inc.* v. *Visa USA, Inc.*, 936 F2d 1096, 1099 (10th Cir. 1991). Altering the status quo requires a court to grant mandatory relief under which the non-moving party must take affirmative action, whereas prohibitory injunctive relief simply preserves the status quo. *See id.* (citing Note, 78 Harv. L. Rev. 994, 1062-63 (1965)). Here, the Government claimed the preliminary injunction alters the status quo—enforcement of the CSA and compliance with the Convention—and therefore asserted the right to relief must be proven "heavily and compellingly."

The requirement that a plaintiff seeking to alter the status quo prove the four preliminary injunction factors "heavily and compellingly" is not followed universally by federal courts.[3] Moreover, an examination of cases

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[3] The requirement that a plaintiff seeking to alter the status quo prove the four preliminary injunction factors "heavily and compellingly" is not followed universally by federal courts. The

from our circuit demonstrates we support Wright and Miller's statement that "[i]t often is difficult to determine what date is appropriate for fixing the status quo." 11A *Charles Alan Wright, Arthur R. Miller, & May Kay Kane, Federal Practice and Procedure,* § 2948 at 137 (2nd ed. 1995). Some of our cases define the status quo as that which *immediately* preceded the litigation. *See Prairie Band of Potawatomi Indians* v. *Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001) (status quo is situation existing at time litigation is instigated.); *SCFC ILC, Inc.* v. *VISA USA, Inc.* 936 F.2d 1096, 1099-1100 (10th Cir. 1991) (status quo is existing status between parties at time court considers request for

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Sixth Circuit, for instance, has wholly rejected the distinction between different standards of proof for mandatory versus prohibitory injunctive relief. In *United Food and Commercial Workers Union, Local 1099* v. *Southwestern Ohio Regional Transit Auth.*, 163 F.3d 341, 348 (6th Cir. 1998), it held:

> We therefore see little consequential importance to the concept of status quo, and conclude that the distinction between mandatory and prohibitory injunctive relief is not meaningful. Accordingly, we reject the Tenth Circuit's 'heavily and compellingly' standard and hold that the traditional preliminary injunctive standard—the balancing of equities—applies to motions for mandatory preliminary injunctive relief as well as motions for prohibitory injunctive relief.

*See also Sluiter* v. *Blue Cross and Blue Shield of Michigan*, 979 F. Supp. 1131, 1136 (E.D. Mich. 1997) (refusing to apply the "heavily and compellingly" test, even though the Eastern District of Michigan had previously done so, because "maintenance of the status quo would threaten [plaintiffs'] lives"). Nor is it well developed in our circuit. We have not articulated the precise meaning of "heavily and compellingly;" instead, the heightened burden appears to influence our determination of how to balance the evidence presented on the preliminary injunction factors. Regardless, the "heavily and compellingly" standard remains a part of our jurisprudence.

injunctive relief.); *Kikumura* v. *Hurley*, 242 F. 3d 950, 955 (10th Cir. 2001) (plaintiff sought to alter status quo through preliminary injunction demanding prison change existing pastoral visit policy).

Not all of our cases take such an absolute approach in defining the status quo, however. In *Valdez* v. *Applegate*, 616 F.2d 570 (10th Cir. 1980), livestock grazers brought an action to enjoin the New Mexico Bureau of Land Management's (BLM) implementation of a grazing plan which reduced the plaintiffs' ability to graze livestock. If we were to follow the approach supported by the government here, we must read BLM's implementation of grazing limits as the status quo because that was the state of affairs immediately preceding the litigation. Without much explanation, however, the *Valdez* court held implementation of the grazing plan should be enjoined to maintain the status quo. *Id.* at 573. It follows, then, the status quo in *Valdez* was the grazing rights enjoyed by the plaintiffs prior to the implementation of the grazing plan.

Likewise, in *Dominion Video*, the court refused to "extend the definition of the status quo to *invariably* include the last status immediately before the filing of injunctive relief." 269 F.3d at 1155 (emphasis added). In *Dominion Video*, Defendant EchoStar argued the status quo was its refusal to activate Dominion subscribers in accordance with terms in a contract between itself and Dominion. *Id.* Prior to this refusal, however, EchoStar had been activating Dominion subscribers regardless of the contract terms. Four days after EchoStar indicated it would no longer activate Dominion subscribers, Dominion brought an action seeking injunctive relief compelling EchoStar to continue its previous practice. *Id.* at 1152. This court rejected

EchoStar's assertions that the status quo be confined "to the four days that preceded the filing of the motion for injunctive relief," *id.* at 1155, stating that the "last uncontested status between the parties was the four years in which EchoStar activated Dominion subscribers." *Id.*

These holdings lead us to conclude the definition of "status quo" for injunction purposes depends very much on the facts of a particular case. *Valdez* and *Dominion Video* support the position that the status quo in this case should be viewed as the time when the plaintiffs were exercising their religious freedoms before the government enforced the CSA against them. As UDV asserts in its brief, the church was possessing its sacrament and practicing its religion. *See* Aple. Br. at 53 . Like *Dominion Video*, it was the government's enforcement action which *changed* the status quo and became the impetus for this litigation. *See Dominion Video*, 269 F.3d at 1155. Hence, the last *uncontested* status between the parties was the plaintiffs' uninhibited exercise of their faith. It is the government's attempt to disrupt that status that UDV seeks to enjoin.

To say the enforcement of the CSA and the Convention against UDV is the status quo ignores the part played in this case by the RFRA. Having based its complaint in RFRA, UDV asserted the existence of a prima facie case, defined as a substantial burden imposed by the federal government on a sincere exercise of religion. *See Kikumura*, 242 F.3d at 960. The Government has conceded UDV established its prima facie case. This concession buttresses the conclusion that the status quo here is not the need to enforce the CSA but rather UDV's religious practice free from a governmentally imposed burden.

Nor do we share the concern of the dissent that because of this reasoning "any party could establish the status quo by surreptitiously engaging in behavior that violated a statute until discovered by law enforcement authorities and then claiming that it is the enforcement of existing law that amounts to a change in the status quo." It is true that under our construction, a plaintiff using a CSA-listed substance or engaging in any other federally prohibited activity could claim a RFRA violation. However, a plaintiff who held insincere religious beliefs or whose practices were not, in fact, burdened by federal laws, would not pass the prima facie stage of RFRA, and, therefore, would not escape the heightened burden of proof for the four preliminary injunction factors. *See*, *e.g.*, *United States* v. *Meyers*, 95 F.3d 1475, 1484 (10th Cir. 1996) (refusing to dismiss marijuana charges against defendant based on RFRA because his "beliefs more accurately espouse a philosophy and/or way of life rather than a 'religion'").

Moreover, even under the standard preliminary injunction test, a court could easily dispose of claims which, while constituting a RFRA prima facie case, had already been ruled invalid. For instance, even under the standard preliminary injunction test, a plaintiff seeking to use marijuana for religious purposes would likely not be able to demonstrate a substantial likelihood of success on the merits because courts have already ruled against sacramental marijuana claims. *See*, *e.g.*, *United States* v. *Rush*, 738 F.2d 497, 512 (1st Cir. 1984) (concluding the Government has a compelling interest in banning the possession and distribution of marijuana notwithstanding the burden on religious practice).

Nor do we perceive a sinister quality to the plaintiffs' practicing their religion in secret. Indeed, history provides many examples in which then unpopular religious beliefs were not openly held. For example, the early Christian church conducted its services in the Roman catacombs. Secrecy, to the faithful, was an essential to self-preservation.

**A. Health Risks to Uniao do Vegetal Members**

The district court found the evidence on the health risks to Uniao do Vegetal members from *hoasca* use was "in equipoise." The dearth of conclusive research on the effects of *hoasca* and DMT fuels the controversy in this case. One preliminary study, conducted in 1993 by Dr. Charles Grob, Professor of Psychiatry at the University of California, Los Angeles, compared 15 long-term Uniao do Vegetal members, who drank *hoasca* for several years, with 15 control subjects who never ingested the tea. Researchers administered a series of psychiatric, neuropsychological, and physical tests and compiled life story interviews. In articles published in various scientific journals, researchers reported a positive overall assessment of the safety of *hoasca*. While acknowledging the limitations of his investigation, Dr. Grob testified:

> [it] did identify that in a group of randomly collected male subjects who had consumed ayahuasca for many years, entirely within the context of a very tightly organized syncretic church, there had been no injurious effects caused by their use of ayahuasca. On the contrary, our research team was consistently impressed with the very high functional status of the ayahuasca subjects.

As the Government emphasized and the district court acknowledged, DMT's Schedule I-listing represents a Congressional finding the substance "has a high potential for abuse," "no currently accepted medical use," and "a lack of accepted safety for use under medical supervision." 21 U.S.C. § 812 (b)(1). Addressing the Grob study specifically, the Government highlighted methodological limitations, including the small size, male-only subjects, and selection bias. According to Dr. Alexander Walker, a Professor of Epidemiology at the Harvard School of Public Health, the selection of long-term members of Uniao do Vegetal, individuals who were able to conform to its norms over extended periods, without a similar requirement for stable, long-term, voluntary church attendance applied to the control group, ensured the *hoasca*-consuming group necessarily had a favorable psychological profile.

Testifying for the Government, Dr. Sander Genser, Chief of the Medical Consequences Unit of the Center on AIDS and Other Medical Consequences of Drug Abuse at the National Institutes of Health, testified, "existing studies have raised flags regarding potential negative physical and psychological effects" of *hoasca*. Dr. Genser cited a study in which two subjects consuming intravenously administered DMT experienced a high rise in blood pressure, and another had a recurrence of depression. Information about the dangerous effect of other hallucinogenic substances, according to Dr. Genser, raises concerns about *hoasca*. For instance, especially in individuals with pre-existing psychopathology, lysergic acid diethylamide (LSD), a hallucinogen substance that shares pharmacological properties with DMT, may produce prolonged psychotic reactions or posthallucinogen perceptual disorder, commonly

known as "flashbacks," defined as the reemergence of some aspect of the hallucinogenic experience in the absence of the drug.

In response, UDV emphasized important differences in ceremonial use and reported effects of *hoasca*. UDV expert, Dr. David Nichols, Professor of Medical Chemistry and Molecular Pharmacology at Purdue University, declared, "[o]rally ingested hoasca produces a less intense, more manageable, and inherently psychologically safer altered state of consciousness." Further, he testified, the "set and setting" in which an individual takes a hallucinogen are critical in determining the experience. Dr. Grob attested to the absence of evidence of flashbacks from *hoasca* use and the milder intensity and shorter duration of *hoasca's* effects compared to those of other hallucinogens. He also declared the ritual setting of Uniao do Vegetal members' consumption minimizes danger and optimizes safety.

Adverse drug interactions stemming from the beta carbolines in *banisteriopsis* are a potential danger acknowledged by even UDV. Individuals who ingest *hoasca* while on certain medications may be at increased risk for developing seratonin syndrome, a condition caused by excessive serotonin levels with symptoms including euphoria, drowsiness, sustained rapid eye movement, overreaction of the reflexes, confusion, dizziness, hypomania, shivering, diarrhea, loss of consciousness, and death. Several types of antidepressants, among other drugs, contain selective serotonin reuptake inhibitors (SSRIs), which trigger the release of serotonin or prevent its reuptake. Monoamine oxidase (MAO) inhibitors, including *hoasca*, interfere with the metabolization of serotonin. The MAOs in

hoasca may hinder the metabolization of greater levels of serotonin made available by the use of SSRIs.

Dr. Genser, for the Government, noted "irreversible" MAO inhibitors, which bind to an MAO molecule and may forever destroy its function, may harmfully interact with many medicines, as well as with a chemical found in some common foods. Conceding a risk of adverse drug interactions, UDV noted the church has instituted a system screening members' use of medications. However, UDV maintained the danger is not so substantial as to warrant a government ban on sacramental *hoasca* use. First, *hoasca* does not contain irreversible MAO inhibitors, the kind associated with the most severe drug interactions. Rather, as UDV experts testified, the potential for adverse interaction is reduced and the effect of any reaction is shorter and much milder with *hoasca* than with irreversible MAOs. Second, Uniao do Vegetal leadership has carefully addressed the possible danger of adverse drug interactions. Dr. Grob declared, "[f]ollowing discussions of our concerns with physicians of the UDV, all prospective participants in ceremonial hoasca sessions have been carefully interviewed to rule out the presence of ancillary medication that might induce adverse interactions with hoasca." Finally, according to UDV, the risk of adverse drug interaction associated with *hoasca* falls within the normal spectrum of concerns. Government experts highlighted other dangerous aspects of *hoasca*, including the increased risk of psychotic episodes. Based on data collected by the medical-scientific department of the Brazilian Uniao do Vegetal, Dr. Genser testified, "pyschosis is definitely of most concern." UDV countered with expert testimony suggesting the link between psychotic disturbances and *hoasca*

is coincidental, rather than causal, and that the reported very low occurrence of psychosis among church members in Brazil is equal or less than the rate in the general population.

We see no basis for disagreeing with the district court's characterization of the evidence as "in equipoise" and hold proper its determination the Government failed to satisfy its RFRA burden on the issue of health and safety risks of *hoasca*. Although studies of *hoasca* are preliminary and limited, Dr. Grob's research indicates an overall positive assessment of the health effects of the substance. Dr. Nichols, expert for the UDV, cogently highlighted the differences between the effects of *hoasca* versus intravenously injected DMT. He further stressed the importance of "set and setting" —for Uniao do Vegetal, a guided, calm ceremony—in determining the psychological impact of hallucinogens.

Critical to this case is that the Government's burden under RFRA was to demonstrate a ban on *hoasca* use by the Uniao do Vegetal, not a ban on hallucinogens in general, promotes a compelling interest in health and safety. The court acknowledged if it "were employing a more relaxed standard to review the application of the CSA to the UDV's use of hoasca, it would be very reluctant to question this Congressional finding concerning DMT." But RFRA provides, "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that *application of the burden to the person*" furthers a compelling interest, not merely application of the law in general. 42 U.S.C. § 2000bb-1(b) (emphasis added). "[U]nder RFRA, a court does not consider the [law] in its general application, but rather considers whether there is a compelling government reason, advanced in the least restrictive

means, to apply the [law] to the individual claimant." *Kikumura*, 242 F.3d at 962.

Thus, recitation of the criteria for listing a substance on CSA Schedule I and of the general danger of hallucinogens does not, in this record, evince a compelling government interest under RFRA. Moreover, "[e]vidence which does not preponderate or is in equipoise simply fails to meet the required burden of proof." *United States* v. *Kirk*, 894 F.2d 1162, 1164 (10th Cir. 1990). The Government "failed to build an adequate record" demonstrating danger to Uniao do Vegetal members' health from sacramental *hoasca* use. *Hardman*, 297 F.3d at 1133.

**B. Risk of Diversion to Non-Religious Use**

The district court concluded the evidence of risk of diversion of *hoasca* from Uniao do Vegetal to non-ceremonial users is "virtually balanced," and, accordingly, held the Government failed to meet its "difficult burden" under RFRA. Further, in a footnote, the court noted, "the specificity of Dr. Kleiman's analysis [testifying for UDV] may even tip the scale slightly in favor of Plaintiffs' position."

The Government argued *hoasca* used by Uniao do Vegetal would be vulnerable to diversion. Testifying for the Government, Terrance Woodworth, Deputy Director of the Drug Enforcement Administration's Office of Diversion Control, identified several factors utilized to assess a controlled substance's potential for diversion, including the existence of an illicit market, the presence of marketing or publicity, the form of the substance, and the cost and opportunity for diversion. Focusing on patterns of drug abuse in the United States, Mr. Woodworth noted a recent substantially

increased interest in hallucinogens in this country. Advertisements for hoasca on the internet and rising consumption of the tea in Europe evince demand for *hoasca* on the illicit market.

According to Mr. Woodworth, the low level of *hoasca* currently consumed is attributable to the lack of available native plants in this country. Were Uniao do Vegetal allowed to import the tea, the likelihood of diversion and abuse would increase. Further, the fact the tea must be shipped from Brazil, where *hoasca* is unregulated, along with the uncooperative relationship between the DEA and Uniao do Vegetal, suggest an exemption for sacramental use would result in illegal diversion.

Dr. Jasinski, Professor of Medicine at the Johns Hopkins School of Medicine, a Government witness, stated he believes the risk of abuse of *hoasca* is substantial. In his view, positive reinforcing, or "euphoric," effects—"the transient alterations in mood, thinking, feeling, and perceptions produced by [a] drug"—are the primary factors leading individuals to try and repeatedly use a drug of abuse. Dr. Jasinski noted research on intravenously injected DMT and preliminary studies on *hoasca* indicate these substances produce euphoric effects, although those of *hoasca* "are slower in onset, milder in intensity, and longer in duration."

While acknowledging the negative effects of *hoasca*, nausea and vomiting, may act as a deterrent to some people, Dr. Jasinski pointed out the percentage of users who vomit is unknown, and, regardless, the negative effects may not outweigh the positive to the extent necessary to deter use. Further, he testified the pharmacological similarities between LSD, recognized to have

abuse potential, and DMT support an inference *hoasca* has substantial abuse potential.

By contrast, UDV maintained *hoasca* does not carry significant potential for abuse or diversion. UDV expert, Dr. Kleiman, Professor of Policy Studies at the University of California, Los Angeles, reported the negative effects of *hoasca* and availability of pharmalogically equivalent substitutes indicate demand for the substance would be low. Hallucinogen users may not tolerate nausea and vomiting. Dr. Kleiman has written:

> hallucinogen substances, including DMT, score much lower on scales measuring reinforcement, and have much less tendency to create dependency, than opiates, such as heroin . . . a much smaller proportion of hallucinogen users than of opiate users would be so strongly driven to seek out the drug experience as to neglect the presence of side-effects.

Further, the tea-like mixture ingested by Uniao do Vegetal members would not be particularly attractive to individuals seeking an oral DMT experience. Instead, "any preparation that included DMT and a sufficient quantity of any monoamine oxidase inhibitor would suffice." Plants containing DMT and harmala alkaloids are available in the United States, some of which when combined do not induce vomiting. Dr. Kleiman declared, "the widespread availability of pharmacologically equivalent substitutes, some of them with fewer unwanted side-effects and less apparent legal risk, would greatly reduce the motivation to divert the sacramental material for the purposes of drug abuse."

Dr. Kleiman also recounted other factors he believes would counteract *hoasca* diversion. First, Uniao do Vegetal-United States is a very small church and would

only import about 3,000 doses per year from Brazil. Second, the relatively thin potential market for *hoasca* would reduce the likelihood of diversion that might occur with widely-used drugs. An individual illegally in possession of *hoasca* would have greater trouble locating a buyer than a cocaine thief. Third, the bulky form of *hoasca* would deter diversion. Dr. Kleiman stated, "[t]he ease of stealing goes up as the volume goes down. The larger the volume, the harder something is to steal." Finally, Uniao do Vegetal has strong incentives to keep its *hoasca* supply from being diverted, as ingestion of the tea outside the sacramental context is considered sacrilegious.

We see no clear error in the district court's characterization of the evidence on the potential for diversion as "virtually balanced." Upon de novo review, we agree with the court's legal conclusion that the Government failed to demonstrate a compelling interest. Notwithstanding the competent reports of experts Mr. Woodworth and Dr. Jasinski, speculation based on preliminary *hoasca* studies and generalized comparisons with other abused drugs, particularly in the face of Dr. Kleiman's powerful contradictory testimony, does not suffice to meet the Government's onerous burden of proof.

### C. United Nations Convention on Psychotropic Substances

Believing the Government's strongest arguments for prohibiting Uniao do Vegetal's *hoasca* use to be health and diversion risks, the district court did not ask the parties to present evidence on the Convention at the hearing. However, in issuing a preliminary injunction, the court qualifiedly rejected the Government's assertion that the Convention requires the United States

ban Uniao do Vegetal's sacramental *hoasca* use. The court concluded the treaty does not cover *hoasca*.

On appeal, the parties take opposing views of whether the Convention's proscription includes *hoasca*. At this point, we do not believe the resolution of this argument is necessary to the appeal. We therefore decline to grant what could only amount to an advisory opinion.

Although "treaties are recognized by our Constitution as the supreme law of the land," *Breard* v. *Greene*, 523 U.S. 371, 376 (1998) (per curiam), that rule does not decide this case. Here we are presented with a conflict between the government's obligations under the 1971 Convention and its obligations under RFRA. In such a situation, the Supreme Court has directed "that an Act of Congress . . . is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute, to the extent of conflict, renders the treaty null." *Id.* (*quoting Reid* v. *Covert*, 354 U.S. 1, 18 (1957) (plurality opinion)). *See also Whitney* v. *Robertson*, 124 U.S. 190, 194 (1888) (if treaty and statute conflict, "the one last in date will control the other").

Thus, even if the Convention does apply to *hoasca*, the United States has obligations under its laws and other international treaties to protect religious freedom. Treaties are part of the law of the land; they have no greater or lesser impact than other federal laws. *Ex parte Cooper*, 143 U.S. 472, 502 (1892). "The freedom to manifest religion . . . in worship, observance, practice and teaching encompasses a broad range of acts" including "ritual and ceremonial acts" and "participation in rituals." *U.N. Hum. Rts. Comm.*, *General Comment No. 22*, at 4 (1993). Moreover, a compelling interest in

abiding by certain laws, including the CSA and the Convention, does not suffice, standing alone, to carry the Government's burden under RFRA. *Hardman*, 297 F.3d at 1125. RFRA requires that an asserted compelling interest be narrowly tailored to the specific plaintiff whose religious conduct is impaired. *Id.*

The Government cites the declaration of Robert E. Dalton, a State Department lawyer for the Treaty Affairs Office, opining that, "[t]he need to avoid a violation of . . . the treaty . . . is undoubtedly a compelling interest," and that violation of the Convention would undermine the United States' leadership role in curtailing illicit drug trafficking. Yet, Mr. Dalton speaks only in the most general of terms regarding the United States' interest in complying with the 1971 Convention, and he does not provide any specifics about why such compliance, resulting in the burdening of the UDV's religious freedoms, represents the least restrictive means of furthering the government's compelling interests. This statement falls short of the government's burden. *See* 42 U.S.C. § 2000bb-1(b); *Hardman*, 297 F.3d at 1130-32 (mere speculation or a "record devoid of hard evidence indicating that the current regulations are narrowly tailored to advance the government's interests" which "does not address the possibility of other, less restrictive means of achieving" those interests is insufficient to satisfy the government's burden under RFRA). Based on the record before us, we cannot conclude the government has demonstrated that "application of the burden to the [UDV] (1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling government interest." 42 U.S.C. § 2000bb-1(b).

**D. Additional Arguments**

Congress has indicated courts should look to cases predating *Smith* in construing and applying RFRA. *See* H.R. Rep. No. 103-88, 103d Cong., 1st Sess., at 6-7 (1993). Importantly, however, Congress' purpose in enacting RFRA was to restore the legal standard applied in pre-*Smith* decisions, rather than to reinstate actual outcomes. S. Rep. No. 103-111, 103d Cong., at 9, *reprinted in* 1993 U.S.C.C.A.N. 1892, 1898.

The district court correctly distinguished on two grounds cases cited by the Government denying individuals' free exercise challenges to drug laws. First, the sincerity of the Uniao do Vegetal faith and the substantial burden the CSA imposes on the practice of the religion are uncontested. By contrast, courts in other RFRA cases cited by the Government have found the plaintiff's beliefs are not religious, are not sincerely held, or are not substantially burdened by governmental action.

For instance, in *United States* v. *Meyers*, involving a criminal defendant who moved under RFRA to dismiss the marijuana charges brought against him, we held in light of the secular nature of Mr. Meyers' views on the medical, therapeutic, and social benefits of marijuana, "Meyers' beliefs more accurately espouse a philosophy and/or way of life rather than a 'religion.'" 95 F.3d. at 1484. Likewise, in cases involving Rastafarianism, where marijuana is a sacrament, the Ninth Circuit concluded the religion did not require distribution, possession with intent to distribute, and money laundering, *United States* v. *Bauer*, 84 F.3d 1549, 1559 (9th Cir. 1996); or the importation of marijuana, *Guam* v. *Guerreo*, 290 F.3d 1210, 1223 (9th Cir. 2002). However, in *Bauer*, the Ninth Circuit held the district court erred

in prohibiting the defendants from using RFRA as a defense to simple possession charges. 84 F.3d at 1559.

Second, *hoasca* and marijuana differ. Marijuana is associated with problems of abuse and control, leading courts to ascertain a particular government interest in its prohibition even for religious uses. *United States* v. *Greene*, 892 F.2d 453, 456-57 (6th Cir. 1989) ("Every federal court that has considered this issue has accepted Congress' determination that marijuana poses a real threat to individual health and social welfare and has upheld criminal penalties for possession and dis - tribution even where such penalties may infringe to some extent on the free exercise of religion."). As the D.C. Circuit observed in acknowledging the legality of the Native American Church's use of peyote but refusing to grant a religious exemption to marijuana, Uniao do Vegetal's use of *hoasca* occurs in a "traditional, precisely circumscribed ritual" where the drug "itself is an object of worship" and using the sacrament outside the religious context is a sacrilege. *Olsen* v. *DEA*, 878 F.2d 1458, 1464 (D.C. Cir. 1989).

According to the Government's reading of precedent involving marijuana and LSD, the Schedule I listing of DMT is enough, standing alone and without further proof of adverse health effects, to demonstrate a compelling interest in a ban on all *hoasca* use. In *United States* v. *Rush*, for instance, the First Circuit, concluding the Government has a compelling interest in banning the possession and distribution of marijuana notwithstanding the burden on religious practice, found, "Congress has weighed the evidence and reached a conclusion which it is not this court's task to review *de novo*." 738 F.2d 497, 512 (1st Cir. 1984). The *Rush*

court declined "to second-guess the unanimous precedent." *Id.* at 512-13.

Along with *United States* v. *Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 493 (2001), *Rush* affirms courts should accord great deference to Congress' classification scheme in the CSA and "be cautious not to rewrite legislation." *Marshall* v. *United States*, 414 U.S. 417, 427 (1974). As the district court in the present case acknowledged, the legislative branch's placement of materials containing DMT in Schedule I reflects a finding such substances have a high potential for abuse and no currently accepted medical use, and lack safety even if used under medical supervision. 21 U.S.C. § 812 (b)(1). Nevertheless, through RFRA, Congress mandated courts to consider whether the application of the burden to the claimant "is in furtherance of a compelling government interest." 42 U.S.C. § 2000bb-1(b). Mere recitation of Congressional findings of a general danger is insufficient to satisfy RFRA.

The Government advanced several additional compelling interests: the uniform application of the CSA, the need to avoid burdensome and constant official supervision and management of Uniao do Vegetal, and the possibility of opening the door to myriad claims for religious exceptions. Averring these arguments were raised for the first time on appeal, UDV urged us not to consider them. *McDonald* v. *Kinder Morgan, Inc.*, 287 F.3d 992, 999 (10th Cir. 2002)[4] ("[A]bsent extraordinary

[4] UDV offered an alternative ground on which we can affirm the district court's result: equal protection. Because the Native American Church's use of peyote is protected, so too should Uniao do Vegetal's use of *hoasca*. The district court disagreed, and we affirm. As the court noted, our government has a special relationship with Native American tribes, rendering the Uniao do Vegetal

circumstances, we will not consider arguments raised for the first time on appeal. This is true whether an appellant is attempting to raise 'a bald-faced new issue' or 'a new theory on appeal that falls under the same general category as an argument presented at trial.'") (citation omitted). We do not believe the Government's additional compelling interests constitute "bald-faced new issue[s]" or a [*sic*] "new theor[ies]." Rather, finding they fall into the same general category of arguments raised below regarding the interpretation of the CSA and risk of diversion, we address them.

We conclude the Government's additional alleged compelling interests are unavailing. First, we do not believe uniform application of the CSA warrants denied of an exemption for Uniao do Vvegetal's sacramental *hoasca* consumption. For reasons stated above, cases involving marijuana, heroin, and LSD are distinguishable. The Government argued the existence of the 1994 amendment to the American Indian Religious Freedom Act, providing a statutory exemption from state prosecution of Native American Church's peyote use, indicates RFRA alone could not sustain an exemption for ceremonial peyote. Likewise, argued the Government, RFRA cannot here support a *hoasca* exemption. But, while the 1994 amendment gave the Native American Church a legislative categorical exemption, RFRA rests the outcome on the government's proof. RFRA only provides access to the courts, placing on the government the burden of justifying a ban on a

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and Native American Church disparately situated despite similarities in religious practice. *Peyote Way Church of God* v. *Thornburgh*, 922 F.2d 1210, 1216 (1991) (Fifth Circuit holding the disparate treatment of Native American peyote religion justified by the government's trust relationship with Native Americans).

religious use of a controlled substance. Federal protection of peyote existed well before RFRA; the statute protected the Native American Church only from state prosecution.

Second, the relatively unproblematic state of peyote regulation and use belies the Government's claimed need for constant official supervision of Uniao do Vegetal's *hoasca* consumption. The DEA does not closely monitor the Native American Church's peyote use, guard the mountains in Texas on which peyote is grown, nor monitor the distribution of peyote outside of Texas. Since its legalization for use by the Native American Church in 1966, peyote remains extremely low on the list of abused substances. While thus far the relationship between Uniao do Vegetal and the DEA has been adversarial, allowing an exemption for religious use might lead to a cooperative relationship similar to the one between the government and the Native American Church. Regardless, the Government cannot overcome RFRA by alleging an increased need for resources.

Third, the specter of a slew of claims for religious exemptions to the CSA does not evince a compelling interest under RFRA. Our ruling in the present appeal in no way calls into question cases refusing to grant an exemption to the CSA for marijuana, LSD, heroin, or any other controlled substances. UDV's position is distinct, and as RFRA requires, we have looked at the specific circumstances of Uniao do Vegetal's ceremonial *hoasca* use and assessed the Government's asserted compelling interests. While we need not consider the CSA in a vacuum, the bald assertion of a torrent of religious exemptions does not satisfy the Government's RFRA burden. Moreover, we leave open the possibil-

ity that future evidence of the health effects and diversion potential may allow the Government to prove a compelling interest in enforcing of the CSA against hoasca's sacramental use.

### III. Conclusion

For these reasons, at this juncture, we hold UDV has demonstrated a substantial likelihood of success on the claim for an exemption to the CSA for sacramental *hoasca* use. We find the other conditions for granting a preliminary injunction present as well. Because "a plaintiff satisfies the irreparable harm analysis by alleging a violation of RFRA," *Kikumura*, 242 F.3d at 963, we conclude the irreparable harm requirement for a preliminary injunction is satisfied. On the balance of the harms and adversity to the public interest, we recognize the importance of enforcement of criminal laws, including the CSA. *New Motor Vehicle Board v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (in a case involving enforcement of the California Automobile Franchise Act, noting a state "suffers a form of irreparable injury" any time it "is enjoined by a court from effectuating statutes enacted by representatives of its people"). Nevertheless, as RFRA—a statute enacted by representatives of the people to protect religious freedom—acknowledges, harm ensues from the denial of free exercise and the public has a significant interest in unburdened legitimate religious expression. Given the critical evidence in support of the Government's alleged compelling interests was "in equipoise" and "virtually balanced," we agree with the district court that UDV has demonstrated the balance of harms and public interest tip in their favor. We **AFFIRM.**

MURPHY, Circuit Judge, dissenting.

The majority affirms a preliminary injunction prohibiting the United States[1] from enforcing the Controlled Substances Act ("CSA"), 21 U.S.C. § 801 *et seq.*, thereby placing the United States in violation of the United Nations Convention on Psychotropic Substances, Feb. 21, 1971 (the "Convention"), 32 U.S.T. 543. Because the majority utilizes the wrong standard in determining whether O Centro Espirita Beneficiente Uniao do Vegetal ("UDV") has made the necessary showing for obtaining a preliminary injunction, and because UDV has not shown that the preliminary injunction factors weigh heavily and compellingly in its favor, I respectfully dissent.

**I. Improper Standard for Preliminary Injunction**

The United States asserts that the district court abused its discretion in granting UDV a preliminary injunction because it utilized an improper standard. *See SCFC ILC, Inc.* v. *Visa USA, Inc.*, 936 F.2d 1096, 1098 (10th Cir. 1991) ("We will set aside a preliminary injunction if the district court applied the wrong standard when deciding to grant the preliminary injunction motion."). In particular, the United States asserts that because the preliminary injunction requested by UDV alters the status quo, the district court should have required UDV to "show that on balance, the four [preliminary injunction] factors weigh heavily and compellingly in [its] favor." *Id.* at 1099. The majority's response to this argument is two-fold: (1) "the last *uncontested* status between the parties was the plaintiffs' uninhibited exercise of their faith," Majority Op. at 14

[1] Each of the defendant-appellants in this case is an officer of the United States sued in his official capacity.

(alteration in original); and (2) UDV's establishment of a *prima facie* case under the Religious Freedom Restoration Act "buttresses the conclusions that the status quo here is not the need to enforce the CSA but rather UDV's religious practice free from a governmentally imposed burden," *id.* at 14-15. Neither of the reasons posited by the majority for concluding that the status quo favors UDV's use of *hoasca* is convincing.

The majority's conclusion that the status quo in this case is contingent on the merits of UDV's RFRA claim is clearly at odds with binding Tenth Circuit precedent. In *SCFC ILC*, the proponent of a preliminary injunction argued that the preliminary injunction entered by the district court preserved the status quo because it was entitled to the relief afforded in the preliminary injunction under various federal and state laws. 936 F.2d at 1099. This court explicitly rejected the contention that the status quo is measured by the parties' legal rights, holding as follows:

> MountainWest confuses "what should be" with "what is." While [Plaintiff] may eventually succeed in convincing the district court, on the merits, to order Visa to issue the cards to it, a final decision so holding would unquestionably alter the status quo. The status quo is not defined by the parties existing *legal rights*; it is defined by the *reality* of the existing status and "relationship" between the parties, regardless of whether the existing status and relationships may ultimately be found to be in accord or not in accord with the parties' legal rights.

*Id.* at 1100 (footnote omitted).

Despite the clear and unambiguous language in *SCFC ILC* defining the status quo by reference to the

reality of the parties' existing status and relationship, as opposed to the parties' legal rights, the majority concludes that the status quo in this case should be measured with reference to the parties' litigation positions, i.e., whether UDV established the existence of a *prima facie* case under RFRA. *See* Majority Op. at 14-15. The majority, like the proponent of the preliminary injunction in *SCFC ILC*, has "confuse[d] 'what should be' with 'what is.'" *Id.* at 1100. In so doing, the majority has carved out the following special rule in RFRA cases: the status quo ante is irrelevant when the proponent of an injunction has submitted evidence establishing a *prima facie* case under RFRA. This special rule, however, is at odds with *SCFC ILC*. *See In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993) (per curiam) ("We cannot overrule the judgment of another panel of this court. We are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court.").

Nor is the majority correct in asserting that the status quo in this case is UDV's use of *hoasca* because it was the government's enforcement of the CSA that was the impetus for the present litigation. Majority Op. at 14. As noted by the panel that stayed the district court's preliminary injunction pending appeal, the status quo in this case is the enforcement of the CSA and compliance with the Convention. *See O Centro Espirita Beneficiente Uniao de Vegetal (USA), Inc. v. Ashcroft*, 314 F.3d 463, 466 (10th Cir. 2002). The record makes clear that both the UDV itself and the United States recognized that the importation and consumption of *hoasca* violated the CSA.

The UDV has made a concerted effort to keep secret their importation and use of *hoasca*. On the relevant

import forms, UDV officials in the United States generally referred to *hoasca* as an "herbal tea"; they never called it *hoasca* or ayahuasca or disclosed that it contained DMT. UDV president Jeffrey Bronfman informed customs brokers that the substance being imported was a "herbal extract" to be used by UDV members as a [*sic*] "health supplement." Furthermore, in an e-mail drafted by Bronfman, he emphasized the need for confidentiality regarding UDV's "sessions" involving *hoasca*: "Some people do not yet realize what confidentiality is and how careful we need to be. People should not be talking publicly anywhere about our sessions, where we have them and who attends them." Finally, when UDV attempted to grow *psychotria viridis* and *banisteriopsis caapi* in the United States, it imported the seeds and plants "clandestinely," in the words used by UDV, and required its members to sign confidentiality agreements to keep their attempts secret. All of these actions by plaintiff UDV demonstrate a recognition that its importation and consumption of *hoasca* violated the CSA. Likewise, when the United States realized that UDV was importing a preparation which contained DMT, it seized that shipment and additional quantities of the preparation found in a search of Bronfman's residence. Accordingly, although UDV eventually sought a preliminary injunction after the seizure of the *hoasca*, at all times leading up to that event the record reveals that the status quo was the enforcement of the CSA.[2]

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[2] UDV baldly asserts in its brief on appeal that "[t]he 'status quo' before this litigation was that the plaintiffs possessed their sacrament and practiced their religion. Defendants' conduct changed the status quo, and did not create the status quo." UDV Brief at 53-54. Under this theory, any party could establish the

status quo by surreptitiously engaging in behavior that violated a statute until discovered by law enforcement authorities and then claiming that it is the enforcement of existing law that amounts to a change in the status quo. UDV's assertion might have some persuasive force if it had openly imported and consumed *hoasca* ***and the United States had acquiesced in those actions for a period of time*** before changing course and enforcing the CSA. Under the facts of this case, however, UDV's assertion is meritless. Unfortunately, the majority signs off on UDV's argument and makes it the law of this circuit. *See* Majority Op. at 14. I simply fail to see how UDV's importation and use of *hoasca* can be called "uncontested" when the government was not aware of the importation and consumption as a direct result of UDV's efforts to keep the matter secret.

For this reason, the majority can take no comfort in *Valdez* v. *Applegate*, 616 F.2d 570, 573 (10th Cir. 1980) or *Dominion Video Satellite* v. *EchoStar Satellite Corp.*, 269 F.3d 1149, 1153 (10th Cir. 2001). *See* Majority Op. at 13-14. In *Valdez*, the plaintiffs had been grazing their cattle in the Rio Puerco Grazing District, a 500,000 acre plot of land encompassing federal, state, and private lands. 616 F.2d at 571. The federal government adopted a revised grazing program which reduced the plaintiffs' ability to graze their livestock. *Id.* The plaintiffs promptly sought a preliminary injunction claiming that the revised grazing program was contrary to federal law in several respects. *Id.* On these facts, it is certainly not surprising this court determined that the status quo was the grazing program in effect prior to the government's proposed revisions. The same is true in *Dominion Video*. In that case, that parties had an ongoing business relationship, wherein EchoStar had been activating Dominion customers to receive Sky Angel satellite programming over a four-year period, despite a serious question whether EchoStar was contractually obligated to do so. 269 F.3d at 1155. When EchoStar declined to activate any further Dominion customers, Dominion immediately brought suit. *Id.* This court rejected EchoStar's contention that the four-day period in which it declined to activate further Dominion customers represented the status quo, holding as follows: "Adopting EchoStar's position would imply that any party could create a new status quo

Because the district court did not recognize that the preliminary injunction requested by UDV would alter the status quo, it failed to require UDV to carry the onerous burden of demonstrating that the four preliminary injunction factors weigh heavily and compellingly in its favor. Accordingly, the district court abused its discretion in issuing the preliminary injunction. *SCFC ILC*, 936 F.2d at 1100. That conclusion, however, does not compel a remand to the district court. Because the record in this case is sufficiently well developed, it is appropriate for this court to determine whether UDV has satisfied its burden of demonstrating that the preliminary injunction factors weigh heavily and compellingly in its favor. *Id.*

**II. Balance of Injury and Public Interest**

I have serious reservations concerning the district court's and majority's conclusion that the United States did not carry its burden of demonstrating that the prohibition against importing or consuming *hoasca* furthers its compelling interests in protecting the health of UDV members and preventing diversion of *hoasca* to non-religious uses. It is unnecessary to reach those questions, however, because UDV did not carry its

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immediately preceding the litigation *merely by changing its conduct toward the adverse party*." *Id.* (emphasis added).

As noted at length above, it cannot be legitimately be [*sic*] argued that the government "changed its conduct" toward UDV. Both the government and UDV have consistently understood that the importation and consumption of DMT violates both the Convention and the CSA. The United States did not take any previous enforcement action against UDV only because UDV was successful at hiding its illegal conduct. As soon as the government became aware of UDV's illegal activities, it seized the *hoasca* and enforced the CSA. This situation is entirely unlike the situations in *Valdez* and *Dominion Video.*

burden of demonstrating that the third and fourth preliminary injunction factors—that the threatened injury to it outweighs the injury to the United States under the preliminary injunction and that the injunction is not adverse to the public interest—weigh heavily and compellingly in its favor.

As noted by this court in staying the preliminary injunction pending appeal, the United States suffers irreparable injury when it is enjoined from enforcing its criminal laws. *O Centro Espirita*, 314 F.3d at 467 (citing *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, Circuit Justice)). This injury to the United States is exacerbated by the fact that any preliminary injunction issued by the district court, as illustrated by the numerous conditions and obligations imposed on the United States by the preliminary injunction actually issued by the district court, would require burdensome and constant official supervision and oversight of UDV's handling and use of *hoasca*.[3] *Id.* (collecting cases and examples). UDV has not carried its burden of demonstrating that the balancing of its injury with that of the government weighs heavily and compellingly in its favor.

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[3] Even a cursory review of the district court's eleven page, thirty-six paragraph preliminary injunction belies the majority's assertion that it preserves, rather than alters, the status quo. As noted at length above, prior to the district court's entry of the preliminary injunction, UDV was surreptitiously importing *hoasca* with the clear knowledge that it was violating the CSA in the process. The district court's preliminary injunction modifies or enjoins enforcement of a staggering number of regulations implementing the CSA, with the result being that the United States must actually set about to aid UDV in the importation of an unlimited supply of *hoasca*.

Furthermore, Congress has specifically found that the importation and consumption of controlled substances is adverse to the public interest. 21 U.S.C. § 801(2) ("The illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people."); *id.* § 801a(1) ("The Congress has long recognized the danger involved in the manufacture, distribution, and use of certain psychotropic substances . . . , and has provided strong and effective legislation to control illicit trafficking and to regulate legitimate uses of psychotropic substances in this country."). In fact, the district court specifically found that the evidence was in equipoise as to the risk of diversion of *hoasca* to non-religious purposes and the danger of health complications flowing from *hoasca* consumption by UDV members. Although this led the district court to conclude that the United States had not carried its burden of demonstrating that the restrictions in the CSA against the importation and consumption of *hoasca* furthered the United States' compelling interests and that, concomitantly, UDV was substantially likely to prevail on the merits of its Religious Freedom Restoration Act claim, the United States has no such burden at the third and fourth steps of the preliminary injunction analysis. At this stage, it is UDV that must demonstrate heavily and compellingly that the requested preliminary injunction is not adverse to the public interest. In light of the congressional findings noted above and the equipoised nature of the parties' evidentiary submissions, UDV has not met its burden.

**III. Violation of the Convention**

Finally, the United States argues convincingly that a preliminary injunction requiring it to violate the Convention could seriously impede its ability to gain the cooperation of other nations in controlling the international flow of illegal drugs. *See* 21 U.S.C. § 801a(1) ("Abuse of psychotropic substances has become a phenomenon common to may countries . . . and is not confined to national borders. It is, therefore, essential that the United States cooperate with other nations in establishing effective controls over international traffic in such substances."); *see also O Centro Espirita*, 314 F.3d at 467 (noting that federal courts should be reluctant to second guess the executive regarding the conduct of international affairs).

The majority fails to consider this factor in determining whether UDV has carried its burden of establishing its entitlement to a preliminary injunction because, according to the majority, even assuming the Convention does cover *hoasca*, the government failed to demonstrate that such an interest must "be narrowly tailored to the specific plaintiff whose religious conduct is impaired." Majority Op. at 27. What the majority apparently fails to realize, however, is that the meaning of the Convention is relevant not only with regard to the first preliminary injunction factor, likelihood of success on the merits, but also with regard to the third and fourth preliminary injunction factors, the balancing of harms and the adversity of the injunction to the public interest.[4]

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[4] Although it is not quite clear, the majority's opinion could be read to state the proposition that the government's interest in complying with its obligations under the Convention are not

The district court concluded that the Convention distinguishes between a "substance" in which the psychoactive component is derived but not "separated" from the plant source, versus a "substance," which is a purified form of the psychoactive drug. Because, according to the district court, plants like *psychotria viridis* are not covered by the Convention, neither are "infusions and beverages" made from such plants, even

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compelling because those obligations conflict with the government's obligations under RFRA. Majority Op. at 25-26. The majority further seems to assert that because RFRA was enacted after the Convention was ratified, the Convention is thereby nullified to the extent it conflicts with RFRA. *Id.* The majority is simply wrong in asserting that there is any kind of inherent conflict between RFRA and the Convention. Although RFRA prohibits the government from burdening a person's exercise of religion unless the burden furthers a compelling governmental interest, it does not attempt to define which interests are compelling. 42 U.S.C. § 2000bb-1 (providing that the government may not substantially burden a person's exercise of religion unless the application of the burden to that person both furthers a compelling governmental interest and does so in the least restrictive manner). What RFRA does do is set out a decisional framework within which a court is to apply the law as it existed prior to the Supreme Court's decision in *Employment Division* v. *Smith*, 494 U.S. 872 (1990). Under this decisional framework, it is certainly possible that the government can advance a compelling interest in support of any action that burdens a person's exercise of religion, but that the governmental action will still need to be enjoined because it will not be the least restrictive means of advancing the compelling interest. In those circumstances, it cannot be said that the governmental interest is not compelling. The question of whether a governmental interest is compelling is wholly independent of the question whether the burden flowing from the advancement of that interest fits within the contours of RFRA. In apparently concluding that the government's interest in complying with the Convention is not compelling because it is "in conflict" with RFRA, the majority has compounded its error.

if the infusion or beverage contains a Schedule I psychotropic chemical. In reaching this conclusion, the district court relied almost exclusively on the 1976 United Nations Commentary on the Convention on Psychotropic Substances (the "Commentary"). The district court's interpretation of the Convention and its reliance on the Commentary is fundamentally flawed.

The Convention defines a "preparation" as "any solution or mixture, *in whatever physical state*, containing one or more psychotropic substances, or [] one or more psychotropic substances in dosage form." Convention, 32 U.S.T. 543, Art. 1(f) (emphasis added). *Hoasca* clearly fits within the plain language of this definition. It is a solution or mixture, in a liquid state, containing the psychotropic substance DMT. The Convention further provides that "a preparation is subject to the same measures of control as the psychotropic substance which it contains." *Id.* Art. 3(1). Accordingly, *hoasca* is subject to the same controls applicable to DMT in a pure, separated form.

The district court appears to be have been led astray by UDV's focus on Article 32 of the Convention and its assertion that Article 32 supports the proposition that plants may receive different treatment than the chemical components contained within the plants. Whether plants are covered by the Convention, however, is irrelevant. UDV does not seek to import and use plants that contain DMT; rather, it seeks to import, possess, and consume a preparation made from such a plant that can have no use other than to produce a drug-induced state, albeit in a sacramental context. In any event, UDV is simply incorrect in asserting that Article 32 supports its assertion that *hoasca* is not a preparation

covered by the Convention because it is derived from a plant. Article 32 provides as follows:

> A State on whose territory there are plants growing wild which contain psychotropic substances from among those in Schedule I and which are traditionally used by certain small, clearly determined groups in magical or religious rites, may, at the time of signature, ratification or accession, make reservations concerning these plants, in respect of the provisions of article 7, except for the provisions relating to international trade.[5]

Convention, 32 U.S.T. 543, Art. 32(4). Article 32 actually suggests that plants are covered by the Convention, inasmuch as the Convention requires signatories to make reservations in order to allow their use. Article 32 also makes clear that even if a signatory makes a reservation, international trafficking in such plants is still prohibited by the Convention.[6]

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[5] Article 7 of the convention obligates signatory nations to prohibit all uses of Schedule I substances, with certain very limited exceptions not relevant here, and to prohibit the import and export of those substances. Convention, Art. 7, 32 U.S.T. 543. It bears emphasizing, however, that Article 32, which allows signatory nations to make a reservation with regard to the use of certain plants like *psychotria viridis* in religious rites, **does not** allow signatories to opt out of the requirement that they prohibit the import or export of those plants. *Id.*, Art. 32(4).

[6] Because the definition of "preparation" is clear and unambiguous, this court is obligated to give it its ordinary meaning absent "extraordinarily strong contrary evidence." *Sumitomo Shoji Am., Inc.* v. *Avagliano*, 457 U.S. 176, 185 (1982). Nevertheless, the district court ignored that clear and unambiguous language in favor of language in the Commentary appearing to indicate that beverages and infusions made from plants containing hallucinogenic substances do not fall within the Convention. The Commentary notes

The plain language of Article 7, coupled with the conforming interpretation of the Convention by the State Department, demonstrates that *hoasca* is a preparation covered by the Convention.[7] The

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that "[n]either . . . the roots of the plant Mimosa hostilis nor Psilocybe mushrooms themselves are included in Schedule I, but only their respective active principles. Commentary at 387. In two footnotes, the Commentary observes generally that "[a]n infusion of roots is used" to consume Mimosa hostilis and that "[beverages . . . are used" to consume Psilocybe mushrooms. *Id.* at 387 nn.1227-28.

The Commentary does not constitute extraordinarily strong contrary evidence. It was drafted by a single author, published five years after the Convention was negotiated, and is, at most, ambiguous on the question whether a preparation like *hoasca*, as opposed to the plant *psychotria viridis*, is covered by the Convention. Because the Commentary was not written by the negotiators or signatories to the Convention, it is not the sort of "negotiating and drafting history" or "postratification understanding of the contracting parties" that courts have traditionally used as evidence of the signatories' intent. *See Zicherman* v. *Korean Air Lines Co.*, 516 U.S. 217, 226 (1996). On the other hand, the interpretation of an international treaty by the United States agency charged with its negotiation and enforcement is entitled to "great weight" from the courts. *Kolovrat* v. *Oregon*, 366 U.S. 187, 194 (1961). The State Department has interpreted the Convention to cover preparations such as *hoasca*. The State Department's interpretation is consistent with the plain language of the Convention and this court is obliged to accord it deference.

[7] For these reasons, the district court erred in concluding that compliance with the Convention does not constitute a compelling interest. Nevertheless, because this case can be resolved based solely on UDV's failure to carry its burden under the third and fourth preliminary injunction factors, I see no need to remand the case to the district court to analyze whether the restrictions contained in the CSA are the least restrictive means of furthering the United States' compelling interest in complying with the Convention.

congressional findings in 21 U.S.C. § 801a(1) make clear that international cooperation and compliance with the Convention is essential in providing effective control over the cross-border flow of such substances. UDV has not carried its burden of demonstrating heavily and compellingly that its interest in the use of sacramental *hoasca* pending the resolution of the merits of its complaint outweighs the harm resulting to the United States from a court order mandating that it violate the Convention. Nor has it shown heavily and compellingly that such an injunction is not adverse to the public interest.

**IV. Conclusion**

For those reasons set out above, I would reverse the district court's entry of a preliminary injunction in favor of UDV. Accordingly, I respectfully dissent.

**APPENDIX C**

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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No. 02-2323

O CENTRO ESPIRITA BENEFICIENTE UNIAO DO VEGETAL, ALSO KNOWN AS UNIAO DO VEGETAL (USA), INC., A NEW MEXICO CORPORATION ON ITS OWN BEHALF AND ON BEHALF OF ALL ITS MEMBERS IN THE UNITED STATES; JEFFREY BRONFMAN, INDIVIDUALLY AND AS PRESIDENT OF UDV-USA; DANIEL TUCKER, INDIVIDUALLY AND AS VICE-PRESIDENT OF UDV-USA; CHRISTINA BARRETO, INDIVIDUALLY AND AS SECRETARY OF UDV-USA; FERNANDO BARRETO, INDIVIDUALLY AND AS TREASURER OF UDV-USA; CHRISTINE BERMAN; MITCHEL BERMAN; JUSSARA DE ALMEIDA DIAS, ALSO KNOWN AS JUSSARA ALMEIDA DIAS; PATRICIA DOMINGO; DAVID LENDERTS; DAVID MARTIN; MARIA EUGENIA PELAEZ; BRYAN REA; DON ST. JOHN; CARMEN TUCKER; SOLAR LAW, INDIVIDUALLY AND AS MEMBERS OF UDV-USA,
PLAINTIFFS-APPELLEES

*v.*

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES; ASA HUTCHINSON, ADMINISTRATOR OF THE UNITED STATES DRUG ENFORCEMENT ADMINISTRATION; PAUL H. O'NEILL, SECRETARY OF THE DEPARTMENT OF TREASURY OF THE UNITED STATES; DAVID C. IGLESIAS, UNITED STATES ATTORNEY FOR THE DISTRICT OF NEW MEXICO; DAVID F. FRY, RESIDENT SPECIAL AGENT IN CHARGE OF THE UNITED STATES CUSTOMS SERVICE OFFICE OF CRIMINAL INVESTIGATION IN ALBUQUERQUE, NEW MEXICO; ALL IN THEIR OFFICIAL CAPACITIES,
DEFENDANTS-APPELLANTS

Filed: Dec. 12, 2002

**ORDER**

Before: KELLY and HARTZ, Circuit Judges.

This matter is before the court on the government's emergency motion for a stay pending appeal, or alternatively an administrative stay pending consideration of a stay pending appeal. Upon consideration thereof,

(1) The government seeks a stay of the district court's November 13, 2002, preliminary injunction enjoining the government from enforcement of the Controlled Substances Act ("CSA"), as it pertains to Plaintiffs' importation, possession, and distribution of hoasca for religious ceremonies. Hoasca is a tea-like mixture made from two Brazilian plants, one of which contains a hallocinogenic controlled substance known as dimethyltryptamine ("DMT"), a Schedule I controlled substance. The district court's preliminary injunction incorporated various findings from its August 12, 2002, memorandum opinion and order which rejected many of the Plaintiff's claims but determined that Plaintiffs were entitled to a preliminary injunction under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb.

(2) We recently discussed the applicable standard for a stay pending appeal in *Homans* v. *City of Albuquerque*, 264 F.3d 1240 (10th Cir. 2001).

> For us to consider a request for a stay or an injunction pending appeal, 10th Cir. R. 8.1 requires the applicant to address the following: "(a) the likeli-

> hood of success on appeal; (b) the threat of irreparable harm if the stay or injunction is not granted; (c) the absence of harm to opposing parties if the stay or injunction is granted; and (d) any risk of harm to the public interest." In ruling on such a request, this court makes the same inquiry as it would when reviewing a district court's grant or denial of a preliminary injunction. *McClendon* v. *City of Albuquerque*, 100 F.3d 863, 868 n.1 (10th Cir. 1996).

*Homans*, 264 F.3d at 1243. When reviewing the district court's grant of preliminary injunctive relief, we may set it aside for an abuse of discretion, an error of law or clearly erroneous factual findings. *See SCFC ILC, Inc.* v. *Visa USA, Inc.*, 936 F.2d 1096, 1098-99 (10th Cir. 1991). Because the injunction in this case alters the status quo (enforcement of the Controlled Substances Act ("CSA") and compliance with the 1971 UN Convention on Psychotropic Substances), the proponents of the injunction should have demonstrated to the district court that the right to relief was "clear and unequivocal." *Id.*

(3) Here, all parties agree that enforcement of the CSA substantially burdens the Plaintiffs' exercise of religion. 42 U.S.C. § 2000bb-1(a). It thus became the government's burden to demonstrate that the burden furthers a compelling governmental interest and is the least restrictive means of furthering that interest. 42 U.S.C. § 2000bb-1(b). The government had "the burdens of going forward with the evidence and of persuasion." 42 U.S.C. § 2000bb-2(3); *United States* v. *Hardman*, 297 F.3d 1116, 1130 (10th Cir. 2002). This circuit had not decided on the appropriate standard of review for a "least restrictive means" analysis by the district court. *Id.* However, we have made it clear that the

"ultimate determination as to whether the RFRA has been violated" is reviewed de novo. *United States* v. *Meyers*, 95 F.3d 1475, 1482 (10th Cir. 1996).

(4) Although RFRA is incorporated into the CSA and must inform treaty obligations, we grant the government's motion in this case for two reasons. First, the district court's conclusion that the 1971 UN Convention on Psychotropic Substances does not extend to hoasca is in considerable tension with the language of that Convention, particularly Article 1(f), defining "preparation" and Article 3, §1 providing that "a preparation is subject to the same measures of control as the psychotropic substances which it contains." Hoasca is plainly a preparation containing DMT. As for the argument that plants cannot constitute preparations, Article 32, § 4 permits "reservations concerning these plants" for magical or religious rites, thereby suggesting that plants are covered, although a reservation concerning a plant (i.e., a substance contained in a plant) is possible. We are unpersuaded that the Commentary or contrary opinions on the meaning of the Convention are sufficient to override the plausible interpretation of the Convention by the executive.

(5) Second, the district court's factual findings are in considerable tension with (if not contrary to) the express findings in the CSA that "any material, compound, mixture, or preparation which contains any quantity of" DMT, 21 U.S.C. § 812 Schedule 1(c), "has a high potential for abuse[,] . . . has no currently accepted medical use in treatment in the United States[,] . . . [and] [t]here is a lack of accepted safety for use of the drug or other substance under medical supervision." 21 U.S.C. § 812(b)(1) (Schedule I required findings); *see also* 21 U.S.C. §801(2) (Congressional find-

ings). The CSA prohibition on involvement with controlled substances is extremely broad. *See* 21 U.S.C. §§ 841(a)(1), 952(a); *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 493 (2001).

(6) Courts have routinely rejected religious exemptions from laws regulating controlled substances employing tests similar to that required by RFRA. *See United States* v. *Greene*, 892 F.2d 453, 456-57 (6th Cir. 1989); *Olsen* v. *DEA*, 878 F.2d 1458, 1461-62 (D.C. Cir. 1989); *Olsen* v. *Iowa*, 808 F.2d 652, 653 (8th Cir. 1986); *United States* v. *Rush*, 738 F.2d 497, 512-13 (1st Cir. 1984); *United States* v. *Middleton*, 690 F.2d 820, 824 (11th Cir. 1982); *see also Employment Div.* v. *Smith*, 494 U.S. 872, 905 (1990) (O'Connor, J., concurring). Even after enactment of RFRA, religious exemptions from or defenses to the CSA have not fared well. *See United States* v. *Brown*, 72 F.3d 134, 1995 WL 732803 (8th Cir. 1995); *United States* v. *Jefferson*, 175 F. Supp. 2d 1123, 1131 (N.D. Ind. 2001). Moreover, as noted by the government here, permission for sacramental use of peyote was granted by Congress *after* enactment of RFRA, suggesting Congressional doubts that RFRA was sufficient (alone) to grant an exemption. Gov't Reply Br. at 9 (citing 42 U.S.C. § 1996a).

(7) The government suffers irreparable injury when its criminal laws are enjoined without adequately considering the unique legislative findings in this field. *See Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J.) (granting stay) ("It also seems to me that any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."). Although we do not minimize the imposition on the Plaintiffs' free exercise of their religious belief, a stay

will merely reinstate the status quo. Concerning the public interest, we have Congressional findings in the CSA regarding the dangers caused by controlled substances "to the health and general welfare of the American people." § 801(2). Moreover, the government contends that an injunction requiring the federal government to violate an international treaty could have serious consequences for efforts to obtain the assistance of other nations in drug control; we are reluctant to second-guess the executive regarding the conduct of international affairs. *See INS* v. *Abudu*, 485 U.S. 94, 110 (1988) (INS decisions entitled to special deference because INS officials "must exercise especially sensitive political functions that implicate questions of foreign relations"). Furthermore, free exercise case law pre-*Employment Division* suggests that religious accommodations requiring "burdensome and constant official supervision and management" are especially disfavored. *Olsen*, 878 F.2d at 1462-63. As indicated by the district court's thirty-six conditions in its preliminary injunction, *see*, *e.g.*, Gov't Emer. Motion, tab A at 4, ¶¶ 7 (requiring provision of social security numbers if requested by the DEA of handlers of hoasca outside of ceremonies); 13 (if DEA requests inspection and Plaintiffs believe DEA inspection would violate association rights, Plaintiffs may withhold inspection pending district court determination of whether the inspections are lawful), extensive judicial and administrative oversight of the Plaintiffs' handling and use of hoasca would likely be necessary in any arrangement that permits Plaintiffs' religious use of hoasca while respecting the public interest in preventing diversion of DMT and protecting the public health and safety.

The government's emergency motion for a stay pending appeal is granted and the district court's preliminary injunction is stayed pending further order of this court.

Entered for the Court
PATRICK FISHER, Clerk

By: /s/ PATRICK FISHER
Deputy Clerk

**APPENDIX D**

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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No. 02-2323
(D.C. No. CIV-00-1647 JP/RLP)

O CENTRO ESPIRITA BENEFICIENTE UNIAO DO VEGETAL, ALSO KNOWN AS UNIAO DO VEGETAL (USA), INC., A NEW MEXICO CORPORATION ON ITS OWN BEHALF AND ON BEHALF OF ALL ITS MEMBERS IN THE UNITED STATES; JEFFREY BRONFMAN, INDIVIDUALLY AND AS PRESIDENT OF UDV-USA; DANIEL TUCKER, INDIVIDUALLY AND AS VICE-PRESIDENT OF UDV-USA; CHRISTINA BARRETO, INDIVIDUALLY AND AS SECRETARY OF UDV-USA; FERNANDO BARRETO, INDIVIDUALLY AND AS TREASURER OF UDV-USA; CHRISTINE BERMAN; MITCHEL BERMAN; JUSSARA DE ALMEIDA DIAS, ALSO KNOWN AS JUSSARA ALMEIDA DIAS; PATRICIA DOMINGO; DAVID LENDERTS; DAVID MARTIN; MARIA EUGENIA PELAEZ; BRYAN REA; DON ST. JOHN; CARMEN TUCKER; SOLAR LAW, INDIVIDUALLY AND AS MEMBERS OF UDV-USA, PLAINTIFFS-APPELLEES

*v.*

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES; ASA HUTCHINSON, ADMINISTRATOR OF THE UNITED STATES DRUG, ENFORCEMENT ADMINISTRATION; PAUL H. O'NEILL, SECRETARY OF THE DEPARTMENT OF TREASURY OF THE UNITED STATES; DAVID C. IGLESIAS, UNITED STATES ATTORNEY FOR THE DISTRICT OF NEW MEXICO; DAVID F. FRY, RESIDENT SPECIAL AGENT IN CHARGE OF THE UNITED STATES CUSTOMS SERVICE OFFICE OF CRIMINAL INVESTIGATION IN ALBUQUERQUE, NEW

MEXICO; ALL IN THEIR OFFICIAL CAPACITIES,
DEFENDANTS-APPELLANTS

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CHRISTIAN LEGAL SOCIETY; THE NATIONAL ASSOCIATION OF THE EVANGELICALS; CLIFTON KIRKPATRICK, AS THE STATED CLERK OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A.); QUEENS FEDERATION OF CHURCHES,
AMICUS CURIAE

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Filed: Nov. 23, 2004

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**ORDER**

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Before: TACHA, Chief Judge, SEYMOUR, PORFILIO, EBEL, KELLY, HENRY, BRISCOE, LUCERO, MURPHY, HARTZ, O'BRIEN, MCCONNELL, and TYMKOVICH, Circuit Judges.

This matter is before the court on the Government's "Motion to Stay Issuance of the Mandate and for Stay Pending Petition for Certiorari." The motion is denied. Judges Ebel, Kelly, Murphy and O'Brien voted to grant the motion and dissent from the decision to deny the motion.

Entered for the Court
PATRICK FISHER, Clerk

By: /s/ PATRICK FISHER
Deputy Clerk

**APPENDIX E**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CIV.00-1647 JP/RLP

O CENTRO ESPIRITA BENEFICIENTE UNIAO DO VEGETAL (A.K.A. UNIAO DO VEGETAL) (USA) ("UDV-USA"), A NEW MEXICO CORPORATION ON ITS OWN BEHALF AND ON BEHALF OF ALL ITS MEMBERS IN THE UNITED STATES, JEFFREY BRONFMAN, INDIVIDUALLY AND AS PRESIDENT OF UDV-USA, CHRISTINA BARRETO, INDIVIDUALLY AND AS SECRETARY OF UDV-USA, FERNANDO BARRETO, INDIVIDUALLY AND AS TREASURER OF UDV-USA, CHRISTINE BERMAN, MITCHEL BERMAN, JUSSARA DE ALMEIDA DIAS, PATRICIA DOMINGO, DAVID LENDERTS, DAVID MARTIN, MARIA EUGENIA PELAEZ, BRYAN REA, DON ST. JOHN, CARMEN TUCKER, AND SOLAR LAW, INDIVIDUALLY AND AS MEMBERS OF UDV-USA, PLAINTIFFS

*v.*

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, DONNIE R. MARSHALL, ADMINISTRATOR OF THE UNITED STATES DRUG ENFORCEMENT ADMINISTRATION, PAUL H. O'NEILL, SECRETARY OF THE DEPARTMENT OF TREASURY OF THE UNITED STATES, DAVID IGLESIAS, UNITED STATES ATTORNEY FOR THE DISTRICT OF NEW MEXICO, AND JOHN O'TOOLE, RESIDENT SPECIAL AGENT IN CHARGE OF THE UNITED STATES CUSTOMS SERVICE OFFICE OF CRIMINAL INVESTIGATION IN ALBUQUERQUE, NEW MEXICO, ALL IN THEIR OFFICIAL CAPACITIES, DEFENDANTS

Aug. 12, 2002

**MEMORANDUM OPINION AND ORDER**

PARKER, Chief Judge.

The Plaintiffs' Motion for Preliminary Injunction (Doc. No. 10), filed December 22, 2000, raised the following issues:[1]

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[1] This Court recognizes that in addition to the claims discussed in this Memorandum Opinion and Order, the Plaintiffs' Complaint and Motion for Preliminary Injunction included a claim under the Administrative Procedure Act (APA), 5 U.S.C. § 701-706. The APA grants courts the authority to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . contrary to constitutional right, . . . [or] in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2). As the Government observes, the Plaintiffs' APA claim is derivative—it hinges on the success of the Plaintiffs' analyses of their other claims. The main significance of the APA claim at this stage of litigation seems to relate to the type of relief that the Plaintiffs seek. The Plaintiffs maintained in their brief in support of their Motion for Preliminary Injunction that the APA empowers this Court to set aside the Government's decision that the Plaintiffs are subject to prosecution for possessing hoasca and to order the Government to return the seized hoasca to the UDV.

The Plaintiffs' Complaint and Motion for Preliminary Injunction also raised claims under the Fourth and Fifth Amendments to the United States Constitution. Under the Fourth Amendment, the Plaintiffs argue that the Government lacked a legal basis to seize the hoasca belonging to the Plaintiffs, and under the Fifth Amendment, the Plaintiffs argue that they were deprived of their hoasca without due process of law. The Plaintiffs rely on their Fourth and Fifth Amendment theories to maintain that they are entitled to the return of the hoasca. The Court believes that, like the APA claim, these claims are derivative of the claims asserted by the Plaintiffs that are discussed at great length in this Memorandum Opinion and Order.

1. Whether the federal government infringed Plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, made applicable to federal statutes by the Due Process Clause of the Fifth Amendment, by selectively enforcing the Controlled Substances Act (CSA) against Plaintiffs. In a Memorandum Opinion and Order filed February 25, 2002, this Court ruled that the Defendants did not violate Plaintiffs' rights under the Equal Protection Clause.
2. Whether, as Plaintiffs contend, several canons of statutory construction instruct that the CSA's treatment of dimethyltryptamine (DMT) as a controlled substance does not extend also to include hoasca as a controlled substance. The Court rejects this argument and holds that the plain language of CSA chosen by Congress clearly covers hoasca as a controlled substance.
3. Whether by interpreting CSA to prohibit the Plaintiffs' use of hoasca, the Defendants have violated Plaintiffs' rights under the Free Exercise Clause of the First Amendment to the United States Constitution by restricting Plaintiffs' religious practices, which focus on the use of hoasca. The Court concludes that the Defendants have not infringed Plaintiffs' rights under the First Amendment because Congress drafted and promulgated CSA as a neutral law of general

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Because the Plaintiffs' APA, Fourth Amendment, and Fifth Amendment claims primarily concern questions about the type of relief the Plaintiffs seek, the Court will defer ruling on these claims at this time.

applicability and the burden it puts on Plaintiffs' practices does not violate the First Amendment.

4. Whether doctrines of international law direct that Defendants, as representatives of the United States government, should permit the Plaintiffs' ceremonial use of hoasca. The Court rules that international law principles do not override Congress' clear application of the CSA to any use of hoasca in the United States.

5. Whether the Defendants have met the heavy burden, imposed by Congress on the government through passage of the Religious Freedom Restoration Act (RFRA), to prove that the CSA's restriction on Plaintiffs' religious practices regarding use of hoasca furthers a compelling governmental interest through the least restrictive means. The Court begins with the observation that Defendants, at this stage of this action, have explicitly conceded that Plaintiffs have established a prima facie case under RFRA, and the Court concludes that, on the basis of the evidence presented thus far, the government has failed to meet its high burden of proof, entitling Plaintiffs to a preliminary injunction based on RFRA.

## I. BACKGROUND

This case centers on a tea, called hoasca, brewed from two plants native to the Amazon River Basin in South America. The consumption of hoasca plays a central role in the religious ceremonies of the O Centro Espirita Beneficiente Uniao do Vegetal (UDV).[2] Founded

[2] The term "hoasca" refers to the specific tea preparation used in the UDV. "Ayahuasca" is a broader term that refers to a category of South American teas containing DMT and beta-carbolines.

in Brazil in 1961, the UDV church blends Christian theology with traditional indigenous religious beliefs. Church doctrine instructs that hoasca is a sacrament, and UDV members ingest the tea during church services. About 8,000 people belong to the UDV in Brazil. In 1993, the UDV officially established a branch of the church in the United States. The United States branch of the UDV, headquartered in Santa Fe, New Mexico, has about 130 members.

The plants used to make hoasca do not grow in this country, and prior to 1999, UDV leaders in the United States imported the tea from Brazil for use in church ceremonies. On May 21, 1999, the United States Customs Service seized a substantial quantity of hoasca from the UDV in the United States. The federal government takes the position that the Controlled Substances Act (CSA), 21 U.S.C. § 801, *et seq.*, prohibits the possession and use of hoasca. One of the plant components of the tea contains dimethyltryptamine (DMT), a hallucinogenic chemical. Under the CSA, DMT is a "Schedule I" controlled substance and hence subject to strict controls. Although the United States has not filed any criminal charges stemming from UDV officials' possession of hoasca, the government has threatened prosecution for future possession of the tea. In light of the government's interpretation of the CSA's application to hoasca, the UDV has ceased using the tea in the United States.

The Plaintiffs in the present action are the United States branch of the UDV, as well as several church leaders and members in the United States. On

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Some witnesses quoted in this Memorandum Opinion and Order use the terms "hoasca" and "ayahuasca" interchangeably.

November 21, 2000, the Plaintiffs filed a Complaint for Declaratory and Injunctive Relief (Doc. No. 1), alleging violations of the Religious Freedom Restoration Act, the First Amendment to the United States Constitution, Equal Protection principles, the Fourth Amendment, the Fifth Amendment, the Administrative Procedure Act, and international laws and treaties. In addition, the Complaint asserts that the CSA does not apply to hoasca. On December 22, 2000, the Plaintiffs filed a Motion for Preliminary Injunction (Doc. No. 10). This Court held a hearing on the Plaintiffs' motion October 22 through November 2, 2001, during which the parties presented evidence and arguments on a number of issues.

As previously noted, on February 25, 2002, the Court entered a Memorandum Opinion and Order denying the Plaintiffs' Motion for Preliminary Injunction as to their Equal Protection claim. This Memorandum Opinion and Order addresses the other grounds on which the Plaintiffs base their Motion for Preliminary Injunction.

## II. STANDARD OF REVIEW

Under Tenth Circuit law, "[a] movant is entitled to a preliminary injunction if he can establish the following: (1) a substantial likelihood of success on the merits of the case; (2) irreparable injury to the movant if the preliminary injunction is denied; (3) the threatened injury to the movant outweighs the injury to the other party under the preliminary injunction; and (4) the injunction is not adverse to the public interest." *Kikumura v. Hurley*, 242 F.3d 950, 955 (10th Cir. 2001). This Memorandum Opinion and Order focuses on the Plaintiffs' likelihood of success on the merits of their First Amendment, RFRA, statutory construction, and international law claims.

This Court recognizes that "[i]f the party seeking the preliminary injunction can establish the last three factors . . . then the first factor becomes less strict—i.e., instead of showing a substantial likelihood of success, the party need only prove that there are 'questions going to the merits . . . so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation.'" *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1246-1247 (10th Cir.2001), quoting *Federal Lands Legal Consortium v. United States*, 195 F.3d 1190, 1194 (10th Cir. 1999). However, given the breadth of the parties' briefing in this case, and the extensiveness of the arguments and evidence presented at the hearing, it seems appropriate to consider the substance of the Plaintiffs' claims at this time. The Court's decisions in this Memorandum Opinion and Order will not foreclose the parties from presenting additional evidence at a trial on the merits. For example, this Court understands that the Government may wish to contest at a later time whether the Plaintiffs have established a prima facie case under RFRA, and that the Plaintiffs may wish to develop a selective prosecution argument.

## III. DISCUSSION

### A. FIRST AMENDMENT CLAIM

The First Amendment to the United States Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." The Supreme Court has observed that "[i]n addressing the constitutional protection for free exercise of religion, [its] cases establish the general proposition that a law that is neutral and of general applicability need not be justified

by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 531, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993), citing *Employment Division, Department of Human Resources of Oregon v. Smith,* 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990). In contrast, a law that is not neutral and is not generally applicable "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Lukumi,* 508 U.S. at 531-32, 113 S. Ct. 2217.

While an evaluation of a free exercise claim typically begins by considering whether the plaintiffs have shown that a governmental action substantially burdens their religious practices, *Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680, 699, 109 S. Ct. 2136, 104 L. Ed. 2d 766 (1989), the Court need not address that preliminary issue in this case. The Government does not contest, at this stage of litigation, that its interpretation of the CSA which prohibits ceremonial hoasca use substantially burdens the Plaintiffs' exercise of their religion. Therefore, this Court turns to the question of whether the CSA is a neutral law of general applicability.

The Plaintiffs argue that the CSA "cannot be characterized as a neutral law of general applicability," because the statute "provides a wide variety of exceptions, exemptions and licenses permitting the use of controlled substances in non-religious settings." Reply, at 31. As support for their argument that the CSA is neither neutral nor generally applicable, the Plaintiffs point to the exemptions set forth in the statute for certain uses of controlled substances. For example, 21

U.S.C. § 872(e) provides that the Attorney General "may authorize the possession, distribution, and dispensing of controlled substances by persons engaged in research." Elsewhere in the CSA, 21 U.S.C. §§ 822 and 823 outline procedures for the Attorney General to use in registering entities that engage in the manufacture and distribution of controlled substances for medical, scientific, research, and industrial purposes.

As the Government observes, the Plaintiffs' analysis seems to deviate from Supreme Court and Tenth Circuit precedent regarding whether controlled substances laws are neutral and generally applicable. In *Smith*, the Supreme Court considered an Oregon drug statute which prohibited the possession of peyote, among other substances, and which contained no exception for the religious use of controlled substances. The plaintiffs in *Smith* had been fired from their jobs for consuming peyote in a ceremonial setting, and the state denied their applications for employment benefits on the basis that the plaintiffs' dismissal stemmed from their use of a controlled substance. The plaintiffs maintained that Oregon had violated their free exercise rights by enforcing the statutory prohibition against peyote to restrict the plaintiffs' religious use of the substance.

Rejecting the *Smith* plaintiffs' argument, the Supreme Court stated that its "decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Id.* at 879, 110 S. Ct. 1595, quoting *United States v. Lee*, 455 U.S. 252, 263, n.3, 102 S. Ct. 1051, 71 L. Ed. 2d 127 (1982) (Stevens, J., concurring in judgment). The Government

stresses that the Oregon law upheld in *Smith* provides exemptions for the use of controlled substances similar to those outlined in the federal Controlled Substances Act. O.R.S. § 475.125. Thus, according to the Government, "*Smith* itself effectively answers Plaintiffs' claim that the medical, scientific, industrial, and research exemptions contained in the Controlled Substances Act render the Act non-neutral and not generally applicable." Response, at 39.

The Tenth Circuit relied on *Smith* in order to reach its decision in *United States v. Meyers*, 95 F.3d 1475 (1996). In *Meyers*, a criminal defendant charged with marijuana offenses under the federal Controlled Substances Act alleged that his adherence to the "Church of Marijuana" required him to distribute the drug. The Tenth Circuit declined to accept Mr. Meyers's argument that the CSA's prohibition of marijuana distribution violated his First Amendment rights. The court held that "Meyers' challenge fails for the same reasons as the respondents challenge in *Smith* failed, i.e., the right to free exercise of religion under the Free Exercise Clause of the First Amendment does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law incidentally affects religious practice." *Id.* at 1481. The comments of the *Meyers* court reflect an assumption that the CSA is a neutral, generally applicable law within the meaning of *Smith.* The court stated, for example, that "when, *as here,* the challenge is to a valid neutral law of general applicability, the law need not be justified by a compelling governmental interest." *Id.*, citing *Lukumi Babalu Aye,* 508 U.S. at 521, 113 S. Ct. 2217 (emphasis added).

Given the opinions in *Smith* and *Meyers*, this Court believes that it has little leeway to accept the Plaintiffs' argument that the CSA is not a neutral, generally applicable law. However, the Plaintiffs contend that this case is distinguishable from *Smith* and *Meyers*. The Plaintiffs maintain that *Smith* and *Meyers* are distinct from the present case in that the courts in *Smith* and *Meyers* were not considering the issue of whether exemptions for scientific research and other uses would render a drug law non-neutral or not generally applicable. In *Smith* and *Meyers*, the parties raising First Amendment challenges to controlled substance laws were not contesting the neutrality or general applicability of those laws. Instead, they were claiming that otherwise-valid laws that incidentally burden the practice of a person's religion could violate that individual's free exercise rights. See *Smith*, 494 U.S. at 878, 110 S. Ct. 1595 (Observing that the plaintiffs "contend that their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is concededly constitutional as applied to those who use the drug for other reasons"); *Meyers*, 95 F.3d at 1481 (Taking note of criminal defendant's suggestion that even a neutral, generally applicable law must be justified by a compelling government interest if it imposes a burden on religious conduct.)

This Court will therefore consider whether the CSA is a neutral, generally applicable law in light of the exceptions that it provides for research and other uses. The United States Supreme Court examined the concepts of neutrality and general applicability in *Lukumi*, 508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472. In *Lukumi,* a church affiliated with the Santeria religion

challenged several ordinances that had been enacted by the Hialeah, Florida city council. Animal sacrifice plays a significant role in the practice of Santeria. When the plaintiff church announced plans to open a house of worship in Hialeah, the city council passed ordinances banning the ritual killing of animals but permitting the killing of animals in many other contexts.

The Supreme Court concluded that Hialeah's regulatory scheme was neither neutral nor generally applicable. The ordinances failed the neutrality test because, taken together, they amounted to a "religious gerrymander." *Id.* at 535, 113 S. Ct. 2217, quoting *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 696, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970) (Harlan, J., concurring). The city council had essentially prohibited the killing of animals for religious reasons while exempting from prohibition almost all non-religious killing. The Hialeah ordinances were not generally applicable, because they were underinclusive with regard to the laws' purported goals, ultimately "pursu[ing] the city's governmental interests only against conduct motivated by religious belief." In reaching its decision, the *Lukumi* court provided helpful guidelines for analyzing the concepts of neutrality and general applicability. This Court will draw on these guidelines in assessing the Plaintiffs' position.

1. NEUTRALITY

Under *Lukumi*, in order to establish that a law is not neutral, a plaintiff must show "that the object or purpose of [the] law is the suppression of religion or religious conduct." *Id.* at 533, 113 S. Ct. 2217. The *Lukumi* court explained that "the minimum requirement of neutrality is that a law not discriminate on its face," but that "[f]acial neutrality is not determinative." *Id.* at

533-34, 113 S. Ct. 2217. Because "[t]he Free Exercise Clause protects against governmental hostility which is masked, as well as overt," courts should look beyond the surface for indications that the purpose of a law is to suppress religion. *Id.* at 534, 113 S. Ct. 2217. The court observed that "the effect of a law in its real operation is strong evidence of its object." *Id.* at 535, 113 S. Ct. 2217.

The Plaintiffs in the present case do not appear to contend that, on its face, the CSA targets the religious use of drugs. Rather, the Plaintiffs seem to argue that a comparison between the statute's treatment of secular uses, as opposed to its treatment of religious uses, supports the inference that the CSA's purpose is to limit the religious use of controlled substances. The Plaintiffs maintain that "the CSA is not neutral as between secular and religious interests," because the law exempts the secular use of controlled substances in medical, scientific, industrial, and research settings, but bans almost all religious uses of controlled substances.[3]

The Plaintiffs' failure to take into account the full spectrum of potential uses for drugs undercuts their argument, however. For example, the Plaintiffs ignore a very important category of secular drug use—recreational drug use. This Court imagines that there are a

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[3] The Plaintiffs also argue that the CSA is not neutral between religions, because the law provides an exemption for the Native American Church's ceremonial use of peyote. The Court has already addressed this issue at length, in the context of the Plaintiffs' claims under the Equal Protection clause and the Establishment Clause. In its Memorandum Opinion and Order entered February 25, 2002, the Court found that the federal government's peyote exemption policy does not constitute impermissible favoritism toward the Native American Church.

number of individuals in the United States who may wish to use a given controlled substance in a setting that is neither scientific nor ceremonial in a religious context. The CSA restricts the freedom of recreational users, as well religious users, to consume controlled substances. This Court cannot reasonably infer from the way that the CSA operates that the purpose of the law is to target religious ceremonial drug use. This case therefore presents much different circumstances from *Lukumi,* where the Supreme Court found, upon examining the operation of the challenged city ordinances, that "[i]t is a necessary conclusion that almost the only conduct subject to [the ordinances] is the religious exercise of Santeria church members." *Id.* at 535, 113 S. Ct. 2217.

2. GENERAL APPLICABILITY

Discussing the requirement of general applicability, the *Lukumi* court observed that "[a]ll laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice." *Id.* at 542, 113 S. Ct. 2217. The "government . . . cannot in a selective manner impose burdens only on conduct motivated by religious belief." *Id.* at 543, 113 S. Ct. 2217. The ordinances at issue in *Lukumi* were so deficient that the court declined to "define with precision the standard used to evaluate whether a prohibition is of general application." *Id.* However, the *Lukumi* court made clear that a law is not generally applicable if it was purportedly adopted to protect certain interests, yet "fail[s] to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than [the banned religious conduct] does." *Id.*

In *Lukumi*, for example, the city of Hialeah claimed that one of the goals of the contested ordinances was to prevent cruelty to animals. The Supreme Court noted, though, that "[m]any types of animal deaths or kills for nonreligious reasons are either not prohibited or approved by express provision." *Id.* at 543, 113 S. Ct. 2217. Hunting, fishing, rodent extermination, and the euthanasia of stray animals all continued to be legal. The *Lukumi* court concluded that "[d]espite the city's proffered interest in preventing cruelty to animals, the ordinances are drafted with care to forbid few killings but those occasioned by religious sacrifice." *Id.* The Court found that the ordinances were similarly under inclusive with respect to the city's claimed goal of protecting public health.

The Third Circuit examined the general applicability requirement in an opinion cited by both the Plaintiffs and the Government. In *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (1999), a Newark Police Department policy required police officers to shave their beards. The police department allowed exceptions to the shaving policy for officers who had medical reasons for not shaving and for undercover officers. Two police officers challenged the departmental policy on the ground that they are Sunni Muslims and their religion prohibits them from shaving.

The Third Circuit found that while the exemption for undercover officers did not diminish the general applicability of the beard policy, the medical exemption did. The Department had adopted the policy to promote a uniform appearance among its officers. The Third Circuit pointed out that "the undercover exception . . . does not undermine the Department's interest in uniformity because undercover officers 'ob-

viously are not held out to the public as law enforcement person[nel].'" *Id.* at 366 (citing reply brief.) In contrast, "the medical exemption raises concern because it indicates that the Department has made a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not." *Id.* at 366.

Like the Third Circuit, the District of Nebraska found that a governmental policy failed to meet the general applicability standard elucidated in *Lukumi*. *Rader v. Johnston*, 924 F. Supp. 1540 (D. Neb. 1996) concerned a University of Nebraska-Kearney rule requiring freshmen to live in dormitories on campus. University officials represented that the goals of the policy were to promote diversity and tolerance, encourage academic achievement, and, for financial reasons, to make sure that there were enough students living on campus to fill the dorms. The plaintiff, a devout Christian, requested an exemption from the on-campus housing policy, so that he could live instead in an off-campus Christian housing facility. The plaintiff maintained that the lifestyle in the dorms, where many students drank alcohol and had parties, would interfere with the practice of his religion. When the university denied the plaintiff's application for an exemption, he brought a claim under the Free Exercise clause.

In reaching its decision, the District of Nebraska took note of the many categories of freshmen exempt from the housing rule. The policy enumerated exceptions for married students, students with parents living nearby, part-time students, and students who were older than nineteen at the start of the school year. In addition, university officials granted a significant number of

exceptions to students applying for waivers based on a variety of special circumstances. Evidence showed that in practice, the university applied the housing rule to only 1,600 of 2,500 freshmen. The District of Nebraska cited the fact that "[o]ver one third of the freshman students . . . are not required to comply with the parietal rule" in determining that "the parietal rule cannot be viewed as generally applicable to all freshman students." *Id.* at 1553. The court stressed that "although exceptions are granted by the defendants for a variety of nonreligious reasons, they are not granted for religious reasons." *Id.* at 1553.

In this case, the Court will follow the approach outlined in *Lukumi.* In order to evaluate the general applicability of the CSA, this Court will inquire into whether the statute is substantially underinclusive as to its purported aims—whether the CSA "fail[s] to prohibit nonreligious conduct that endangers" governmental interests "in a similar or greater degree than" the religious ceremonial consumption of controlled substances does. In their memorandum in support of the motion for preliminary injunction, the Plaintiffs emphasize that through the CSA's registration scheme for drugs used in medical, scientific, industrial, and research settings, huge amounts of controlled substances are produced and distributed. However, this Court believes, as does the Government, that the *Lukumi* framework requires the Plaintiffs to demonstrate more than that the CSA includes significant exceptions for certain secular uses of controlled substances. Rather, the Plaintiffs must show that the research and scientific exceptions to the CSA jeopardize the same interests that the government uses to justify the restrictions on religious conduct imposed by the CSA.

The Court concludes in this case that the secular exceptions specified in the CSA do not implicate the purpose of the law. The Government has suggested that in enacting the CSA, "Congress's primary target was a secular one: the recreational use of controlled substances." Reply at 37, citing H.R. Rep. No. 91-1444, 91st Cong., 2d Sess., reprinted in 1970 U.S.C.C.A.N. 4566. This Court agrees that the CSA reflects Congressional concern about the risks to public health and safety associated using controlled substances. Included among the findings at the beginning of the CSA is the statement that "[t]he illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the Amerian people." 21 U.S.C. § 801(2).

As the Third Circuit explained in the *City of Newark* case, "the Free Exercise Clause does not require the government to apply its laws to activities that it does not have an interest in preventing." 170 F.3d at 366. Here, allowing certain uses of drugs in controlled scientific, research, and medical environments does not run counter to the government's interest in promoting public health. The unregulated consumption of drugs in ceremonial settings may present risks of adverse health effects and illegal diversion in a way that the research exceptions do not. See, e.g., Hrg. Tr. at 864, Testimony of Sander Genser (Discussing why controlled research settings ensure relative safety.) This Court concludes that the CSA meets the standard for general applicability, because the law generally applies to the uses of controlled substances that endanger public health.

While the Plaintiffs' initial argument in favor of their free exercise claim focused on the research exemptions

set forth in the CSA, the Plaintiffs' reply brief and trial brief present a different contention—that although some plants growing within the United States contain DMT, "the government has singled out hoasca for suppression and has singled out the adherents of the UDV for threat of criminal prosecution." Reply, at 34. According to the Plaintiffs, "the Department of Justice, DEA and Customs have made the administrative decision to remain aloof from any thorny decisions regarding the possession and abuse of DMT-containing plants that grow in this country and has chosen, instead, to limit its enforcement efforts to religious use of DMT-containing plants." Supplemental Trial Memorandum, at 5. The Plaintiffs seems to draw on an Equal Protection theory, arguing that even if the CSA is impartial, the Government is applying it in a way that discriminates against the Plaintiffs on the basis of religion. (See, e.g., *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312, 96 S. C t. 2562, 49 L. Ed. 2d 520 (1976), stating that "equal protection analysis requires strict scrutiny of a legislative classification . . . when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class.")

During the hearing, the Plaintiffs presented evidence showing that certain plants growing in this country, including phalaris grass, contain DMT. The Plaintiffs' evidence included a document showing that the United States Department of Agriculture even recommends using one kind of phalaris for erosion control. The Plaintiffs appear to argue that if people are allowed to grow phalaris grass for nonreligious reasons, while the UDV's supply of hoasca is confiscated, this Court should conclude that the federal government must be

discriminating against the Plaintiffs on the basis of religion. The Court does not believe that the evidence about phalaris would necessarily lead to that conclusion. Individuals with phalaris grass in their lawns may possess DMT in some sense. However, if there are no indications that the people with phalaris lawns are *consuming* the grass, law enforcement might legitimately choose not to prosecute, for reasons other than that the grass is being used for the secular purpose of having a lawn. Federal law enforcement entities might prioritize focusing on the UDV's hoasca use not because the use is religious, but instead because UDV members make much more extensive use of hoasca by personally ingesting it than a person with a phalaris lawn makes of the grass. Before their tea was confiscated, UDV officials regularly distributed the tea to church members for consumption.

Some evidence presented at the hearing suggested that non-religious consumption of plants containing DMT does take place in the United States. This evidence included materials taken from the internet —advertisements for plants containing DMT and testimonials from people claiming to have used teas similar to hoasca. While such evidence might eventually contribute to support an argument that the UDV was selectively prosecuted on the basis of religion, this evidence, standing alone, is insufficient to create an inference that selective prosecution in fact occurred. As the Government observes, the use of DMT reported on the internet differs in scale from the UDV's use, and the authorities may have chosen to target the UDV for reasons other than religion. The Government notes that "[t]he possibility that an internet account of a single dose may be accurate and could be reliably

traced to the perpetrator cannot compare to the actual interception of 3,000 doses of an illegal substance being imported for distribution." Trial Memorandum, at 13.

In its February 25, 2002 Memorandum Opinion and Order addressing the Plaintiffs' Equal Protection claim, the Court noted that Plaintiffs' counsel have represented that following discovery, the Plaintiffs may pursue a claim that the government has impermissibly targeted the UDV in particular for prosecution. By finding that the Plaintiffs' evidence is not sufficient at this time to support a preliminary injunction based on a selective prosecution theory, the Court does not intend to foreclose further efforts by the Plaintiffs to develop that theory.

B. PLAINTIFFS' ARGUMENT THAT THE CSA DOES NOT EXTEND TO HOASCA

This Court has thus far assumed, in considering the Plaintiffs' claims under the United States Constitution, that the CSA's ban on DMT applies to hoasca. The Plaintiffs argue, however, that "[e]ven if the Defendants were not violating Plaintiffs' rights under RFRA and the Free Exercise and the Equal Protection clauses, their actions are nonetheless illegal because hoasca is not a controlled substance" under the CSA. The Plaintiffs acknowledge that "[o]ne of the plants that comprise Hoasca, *psychotria viridis*, is naturally composed, in very small part, of DMT." The Plaintiffs also recognize that DMT is scheduled as a controlled substance under the CSA. They maintain, though, that the CSA prohibits only synthetic DMT, and not the DMT occurring naturally in plants. The Plaintiffs premise this argument on the proposition that the language of the CSA is ambiguous as applied to DMT in a natural state.

As the United States Supreme Court has made clear, "[t]he starting point for . . . interpretation of a statute is always its language." *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739, 109 S. Ct. 2166, 104 L. Ed. 2d 811 (1989). Thus this Court must first look to the language of the CSA in order to evaluate the Plaintiffs' arguments. The CSA divides controlled substances into five schedules, classified according to Congressional determinations regarding each drug's potential for abuse and each drug's accepted medical uses.[4] The CSA places a number of hallucinogenic drugs into Schedule I, the most strictly regulated category. Schedule I(c) provides that "[u]nless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation, which contains any quantity of the following hallucinogenic substances" falls within the Schedule I category. Among the hallucinogens listed in Schedule I(c) is dimethyltryptamine (DMT).

This Court agrees with the Government that the language of the CSA clearly covers hoasca. After all, the Plaintiffs do not dispute that one of the plant components of hoasca contains DMT. The Court is constrained to conclude that hoasca tea thus constitutes a "material, compound, mixture, or preparation which contains any quantity" of DMT, within the plain meaning of the statute.

However, the Plaintiffs offer a number of theories of statutory construction to support their argument that

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[4] A drug's placement in Schedule I indicates that the substance "has a high potential for abuse," that it "has no currently accepted medical use in treatment in the United States," and that "[t]here is a lack of accepted safety for use of the drug . . . under medical supervision." 21 U.S.C. § 812(b)(1).

the CSA should not be interpreted to apply to plants that contain DMT and to substances derived from those plants. For example, the Plaintiffs stress that Congress is presumed to avoid superfluous drafting. See, e.g., *Gustafson v. Alloyd Co.*, 513 U.S. 561, 574, 115 S. Ct. 1061, 131 L. Ed. 2d 1 (1995). The Plaintiffs observe that the CSA contains a number of instances where Congress expressly banned both a given chemical and the plant in which that chemical is naturally found. Based on this, the Plaintiffs declare that because Congress listed only a chemical substance, DMT, it did not intend that plants containing that substance would also be prohibited. Otherwise, Congress would have engaged in superfluous drafting elsewhere in the CSA by, for example, explicitly scheduling both peyote (a plant) and mescaline (a chemical substance.)

The Plaintiffs have also drawn on the following principles to argue that the CSA should not be interpreted to ban hoasca: 1) the canon that courts should not construe statutory provisions to contradict other parts of a statutory scheme, see e.g., *United Savs. Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371, 108 S. Ct. 626, 98 L. Ed. 2d 740 (1988); 2) the principle of "*Expressio unius est exclusio alterius*", see e.g., *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993); 3) the rule of lenity, see e.g. *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22, 73 S. Ct. 227, 97 L. Ed. 260 (1952); and 4) the principle that courts should construe statutes to avoid constitutional problems, see e.g., *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500, 99 S. Ct. 1313, 59 L. Ed. 2d 533 (1979).

The Plaintiffs have presented interesting arguments under all of these theories, and their arguments may well have been persuasive if the statute at issue were any less clear. As the Government points out, however, most of the principles discussed by the Plaintiffs become relevant only if the statutory language is ambiguous. The Supreme Court has noted that:

> In any event, canons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. See, e.g., *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241-242, 109 S. Ct. 1026, 1030-1031, 103 L. Ed. 2d 290 (1989); *United States v. Goldenberg*, 168 U.S. 95, 102-103, 18 S. Ct. 3, 4, 42 L. Ed. 394 (1897); *Oneale v. Thornton*, 6 Cranch 53, 68, 3 L. Ed. 150 (1810). When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete." *Rubin v. United States*, 449 U.S. 424, 430, 101 S. Ct. 698, 701, 66 L.Ed.2d 633 (1981); see also *Ron Pair Enterprises, supra*, 489 U.S., at 241, 109 S. Ct., at 1030.

*Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992). More recently, the Supreme Court has explained that a court's "first step 'is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case,'" and that "[t]he inquiry ceases 'if the statutory language is unambiguous and the statutory scheme is coherent and con-

sistent.'" *Barnhart v. Sigmon Coal Company, Inc.*, 534 U.S. 438, 122 S. Ct. 941, 151 L. Ed. 2d 908 (2002), quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997).

Granted, a court should not read a statute literally if a literal construction would "lead to irreconcilable inconsistencies or clearly absurd results that Congress could not have intended." *Resolution Trust Corp. v. Westgate Partners, Ltd.*, 937 F.2d 526, 531 (10th Cir. 1991). However, this Court does not believe that interpreting the CSA to prohibit hoasca use results in absurdity or creates an internally-contradictory statute. The Plaintiffs observe that many plants and animals, including humans, contain DMT; and the Plaintiffs imply that because the CSA cannot be read to ban humans, that the statute must apply only to synthetic DMT. Simply because banning humans would be absurd does not mean that banning any non-synthetic DMT found elsewhere would be absurd. Courts confronted with potentially absurd statutory applications are to consider "alternative interpretations consistent with the legislative purpose." *Oxy USA, Inc. v. Babbitt*, 268 F.3d 1001, 1012 (10th Cir. 2001), quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575, 102 S. Ct. 3245, 73 L. Ed. 2d 973 (1982). In this case, interpreting the CSA to apply to the ingestion of a tea containing a hallucinogenic chemical seems reasonable, even if interpreting the CSA to apply to the human body does not.

In addition, the Plaintiffs have failed to establish that interpreting the CSA to apply to hoasca would contradict other provisions of the statute. The Plaintiffs have not pointed to any contradictions that directly concern the CSA's treatment of DMT and substances

containing DMT. It is not as if the statute places DMT in one schedule and products made with DMT in another schedule, for example. Rather, the Plaintiffs' arguments rely on an analysis of the CSA's approach to other drugs.

The Plaintiffs argue that construing the CSA's prohibition on DMT to apply to hoasca creates a contradiction in the federal peyote exemption scheme. The CSA schedules both peyote, a cactus button, and mescaline, the hallucinogenic chemical found in peyote, but the federal regulatory exemption refers only to peyote, and not to mescaline. The Plaintiffs maintain that "[i]f the listing of a substance encompasses all plants that contain the substance, then the exemption for peyote alone is meaningless: the [Native American Church] would violate the CSA at each of its ceremonies by using a plant that contains 'mescaline.'" Memorandum in Support of Motion for Preliminary Injunction, at 33. The Government has effectively countered the Plaintiffs' argument by pointing out that a member of the Native American Church would not violate the CSA by using peyote, even if peyote contains mescaline, because the federal regulatory exemption explicitly permits church members to use peyote.

Because the plain language of the CSA clearly indicates that the statute's prohibition on DMT extends to hoasca, and because the application of the statute does not result in absurdity or in internal contradictions, this Court concludes that hoasca is an illegal substance under the CSA.

C. PLAINTIFFS' CLAIMS UNDER INTERNATIONAL LAW OF COMITY

This Court's conclusion that the language of the CSA is unambiguous, with respect to the statute's application to the use of hoasca by the UDV, resolves another of the Plaintiffs' claims. The Plaintiffs contend that the international law doctrine of comity suggests that the government should not interfere with the UDV's religious consumption of hoasca. Comity is "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." *In the Matter of the Colorado Corp.*, 531 F.2d 463, 468 (10th Cir. 1976), quoting *Hilton v. Guyot*, 159 U.S. 113, 16 S. Ct. 139, 40 L. Ed. 95 (1895). The United States Supreme Court has observed that "[c]omity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522, 543 n.27, 107 S. Ct. 2542, 96 L. Ed. 2d 461 (1987).

The Plaintiffs stress that courts have recognized a "canon of statutory construction that requires courts, whenever possible, to construe federal statutes to ensure their application will not violate international law." *Commodity Futures Trading Commission v. Nahas*, 738 F.2d 487, 493 (D.C. Cir. 1984), citing *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118, 2 L. Ed. 200 (1804) ("[A]n act of congress ought never to be construed to violate the law of nations, if

any other possible construction remains.") See also, e.g., *Grunfeder v. Heckler*, 748 F.2d 503, 509 (9th Cir. 1984) ("Absent an expression of congressional intent to the contrary, considerations of courtesy and mutuality require our courts to construe domestic legislation in a way that minimizes interference with the purpose or effect of foreign law.")

The Plaintiffs argue that allowing the Government to prohibit the UDV's ceremonial use of hoasca would conflict with Brazilian law and with a number of international treaties.[5] As Dr. Brito testified during the evidentiary hearing, Brazil permits members of the UDV to consume hoasca for religious reasons. The Plaintiffs also emphasize that international agreements to which the United States is a party, such as the United Nations International Covenant on Civil and Political Rights, pledge support for freedom of religious beliefs and practices. Moreover, Plaintiffs direct attention to the International Religious Freedom Act, 22 U.S.C. § 6401-6481, enacted in 1998, which, Plaintiffs say, further reflects Congressional commitment to the promotion of religious freedom throughout the world.[6]

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[5] The Plaintiffs do not appear to argue that any treaty explicitly or directly requires that the United States refrain from prohibiting the religious use of hoasca. Rather, the Plaintiffs seem to contend that the Government's interpretation of the CSA to apply even to the sacramental consumption of hoasca is inconsistent with general principles of international religious freedom that are reflected in treaties to which the United States is a signatory. Therefore, this Court has not conducted an inquiry into the issue of whether, for example, a later-enacted treaty would trump the ban on DMT contained in the CSA.

[6] However, as the Plaintiffs acknowledge, Congress passed this statute to address threats to religious freedom occurring in countries other than the United States.

According to the Plaintiffs, permitting the ceremonial use of hoasca would "not only show comity to, and enhance our relations with, [Brazil], but will also demonstrate our government's willingness to give appropriate respect to a multi-cultural international community generally." Memorandum in Support of Motion for Preliminary Injunction, at 44.

Even assuming that principles of international law would favor construing an *ambiguous* controlled substances statute to allow the religious use of hoasca, this Court believes that the CSA does not leave room for the interpretation the Plaintiffs request. As the United States Court of Appeals for the District of Columbia Circuit eloquently stated in *Nahas*, "[f]ederal courts must give effect to a valid, unambiguous congressional mandate, even if such effect would conflict with another nation's laws or violate international law." 738 F.2d at 495. The sources cited by the Plaintiffs for the proposition that a domestic law should not be interpreted to conflict with international law, such as the *Murray* and *Grunfeder* cases, 2 Cranch 64, 2 L.Ed. 208 and 748 F.2d at 509, assume that the domestic law lends itself to more than one interpretation. In this case, the Court has found that, under the plain language of the CSA, the statute's ban on DMT clearly extends to hoasca. Comity is not an "absolute obligation," *Colorado Corp.*, 531 F.2d at 468, quoting *Hilton*, 159 U.S. at 163-64, 16 S. Ct. 139, and this Court cannot rely on the comity principle to disregard a clear statement from Congress on a matter of domestic law.

D. RELIGIOUS FREEDOM RESTORATION ACT CLAIM

In Section III(A) above, this Court evaluated the Plaintiffs' Free Exercise claim in light of the Supreme

Court's holding in *Smith* that "the right to free exercise of religion does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability," even if that law incidentally burdens the practice of religion. *United States v. Meyers*, 95 F.3d 1475, 1480 (10th Cir. 1996), citing *Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876. Because this Court concluded that the CSA was neutral and generally applicable, the Court found that the Plaintiffs were not entitled to a preliminary injunction on their First Amendment claim.

However, the Plaintiffs also raise a religious freedom claim that has a statutory, rather than Constitutional, basis. Following the Supreme Court's decision in *Smith*, Congress enacted the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb. In the "Congressional findings and declaration of purposes" section of the statute, Congress criticized the Supreme Court's holding in *Smith* and stated that RFRA was intended "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972)." RFRA provides that:

> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person -
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000bb-1(b).[7]

In order to state a *prima facie* claim under RFRA, a plaintiff must show "(1) a substantial burden imposed by the federal government on a(2) sincere (3) exercise of religion." *Kikumura v. Hurley*, 242 F.3d 950, 960 (10th Cir. 2001). If the plaintiff meets "the threshold requirements by a preponderance of the evidence, the burden shifts to the government to demonstrate that the challenged regulation furthers a compelling state interest in the least restrictive manner." *Meyers*, 95 F.3d at 1482. In this case, the Government did not dispute, for purposes of the Plaintiffs' motion for preliminary injunction, that the Plaintiffs had established a *prima facie* case under RFRA. Stated differently, the government conceded, at this point in the course of the case, that the CSA imposes a substantial burden on Plaintiffs' sincere exercise of religion. Hence, the hearing began with the Government shouldering the weighty load thrust upon it by Congress in passing RFRA.

1. COMPELLING GOVERNMENTAL INTERESTS

The Government asserts that it "has at least three compelling interests in prohibiting the importation and use of DMT-containing substances, all of which are implicated by the UDV's religious use of ayahuasca." Response, at 15. The Government has alleged a compelling interest in 1) adhering to the 1971 Convention

[7] In *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997), the Supreme Court declared RFRA unconstitutional as applied to state governments. However, the Tenth Circuit has held that "RFRA as applied to the federal government is severable from the portion of RFRA declared unconstitutional in *Flores*, and independently remains applicable to federal officials." 242 F.3d 950, 960 (10th Cir. 2001).

on psychotropic substances; 2) preventing the health and safety risks posed by hoasca; and 3) preventing the diversion of hoasca to non-religious use.

Before turning to a specific analysis of whether the Government has met its burden of establishing a compelling interest, this Court notes that there are two significant distinctions between the present case and many other cases in which individuals have challenged drug laws on religious freedom grounds. First, as observed above, the Government concedes for purposes of this motion that the UDV is a religion, that the Plaintiffs sincerely believe in the tenets of the UDV religion, and that the application of the CSA to the UDV's ceremonial use of hoasca substantially burdens the Plaintiffs' practice of their religion. In contrast, courts in other RFRA cases concerning drugs have sometimes found that the plaintiff's religious beliefs do not constitute religious beliefs, or that the plaintiff does not sincerely hold the beliefs, or that the government's action does not actually substantially burden the plaintiff's religious practice.

*United States v. Meyers*, 95 F.3d 1475 (10th Cir. 1996) involved a criminal defendant who moved under RFRA to dismiss the marijuana charges brought against him. Mr. Meyers "testified that he is the founder and Reverend of the Church of Marijuana and that it is his sincere belief that his religion commands him to use, possess, grow and distribute marijuana for the good of mankind and the planet earth." *Id.* at 1479. The Tenth Circuit considered whether Mr. Meyers's convictions were "religious beliefs," or whether the convictions instead amounted to "a philosophy or way of life." *Id.* at 1482. The Tenth Circuit adopted the district court's finding that, in light of the secular nature of Mr.

Meyers's views on the medical, therapeutic, and social benefits of marijuana, "Meyers' beliefs more accurately espouse a philosophy and/or way of life rather than a 'religion.'" *Id.* at 1484.

In *United States v. Bauer*, 84 F.3d 1549 (9th Cir. 1996), a Ninth Circuit case, three criminal defendants sought to rely on RFRA in defending against a number of marijuana charges. The defendants were adherents to the Rastafarian religion, in which marijuana is a sacrament. The *Bauer* court emphasized that the availability of RFRA as a defense to the various marijuana charges hinged on whether each particular criminal provision burdened the practice of Rastafarianism. The Ninth Circuit found that the district court had erred in prohibiting the defendants from using RFRA as a defense to simple possession charges. *Id.* at 1559. However, "[a]s to the counts relating to conspiracy to distribute, possession with intent to distribute, and money laundering, the religious freedom of the defendants was not invaded" because "[n]othing before [the court] suggests that Rastafarianism would require this conduct." *Id.* In a more recent Ninth Circuit case, the court cited *Bauer* in holding that a criminal defendant could not draw on RFRA to defend against charges brought under a Guam statute prohibiting the importation of controlled substances. *Guam v. Guerrero*, 290 F.3d 1210 (9th Cir. 2002). The *Guerrero* court noted that it was "satisfied that Rastafarianism does not require *importation* of a controlled substance." *Id.* at 1223.

There is a second major distinction between the present case and the cases involving claims that the principles of religious freedom reflected in the Free Exercise Clause and RFRA should be interpreted as

permitting the sacramental use of marijuana. This distinction stems from the significant differences in the characteristics of the drugs at issue. Affirming a trial court's denial of a criminal defendants' request to rely in RFRA as a defense to marijuana charges, the Eighth Circuit stated "that the government has a compelling state interest in controlling the use of marijuana." *United States v. Brown*, 72 F.3d 134 (8th Cir. 1995) (table). As support for this observation, the *Brown* court cited a number of First Amendment opinions which had emphasized problems associated with marijuana in particular. See, e.g., *United States v. Greene*, 892 F.2d 453, 456-57 (6th Cir. 1989) ("Every federal court that has considered this issue has accepted Congress' determination that marijuana poses a real threat to individual health and social welfare and had upheld criminal penalties for possession and distribution even where such penalties may infringe to some extent on the free exercise of religion."); *United States v. Middleton*, 690 F.2d 820, 825 (11th Cir. 1982), quoting *Leary v. United States*, 383 F.2d 851, 860-61 (5th Cir. 1967) ("It would be difficult to imagine the harm which would result if the criminal statutes against marihuana were nullified as to those who claim the right to possess and traffic in this drug for religious purposes.")

The parties in this case have presented a great deal of evidence on the issue of whether the United States has a compelling interest in prohibiting the UDV's religious use of hoasca. Of course, regardless of what this evidence might suggest regarding the dangers associated with hoasca, the Court cannot ignore that the legislative branch of the government elected to place materials containing DMT in Schedule I of the CSA, reflecting findings that substances containing

DMT have "a high potential for abuse," and "no currently accepted medical use in treatment in the United States," and that "[t]here is a lack of accepted safety for use of [DMT] under medical supervision." 21 U.S.C. § 812(b)(1). Discussing another statute concerning controlled substances, the Supreme Court once noted, "[w]hen Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation, even assuming, arguendo, that judges with more exposure to the problem might make wiser choices." *Marshall v. United States*, 414 U.S. 417, 427, 94 S. Ct. 700, 38 L. Ed. 2d 618 (1974). More recently, the Supreme Court's opinion in *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 493, 121 S. Ct. 1711, 149 L. Ed. 2d 722 (2001) suggested that courts should accord a great deal of deference to Congress's classification scheme in the CSA.

The Government argues that "Congress has made an affirmative statutory declaration that materials containing DMT . . . are unsafe." Response, at 27-28. If this Court were employing a more relaxed standard to review the application of the CSA to the UDV's use of hoasca, it would be very reluctant to question this Congressional finding concerning DMT. However, the Plaintiffs are relying on RFRA, a more recent legislative enactment by Congress, to challenge the extension of the CSA's ban on DMT to the UDV's religious consumption of hoasca. Under RFRA, Congress mandated that a court may not limit its inquiry to general observations about the operation of a statute. Rather, "a court is to consider whether the '*application* of the burden' to the claimant 'is in furtherance of a com-

pelling governmental interest' and 'is the least restrictive means of furthering that compelling governmental interest.' 42 U.S.C. § 2000bb-1(b) (emphasis added)." *Kikumura*, 242 F.3d at 962. In *Kikumura*, a case in which a federal prisoner was challenging a decision made by prison officials, the Tenth Circuit Court of Appeals noted that "under RFRA, a court does not consider the prison regulation in its general application, but rather considers whether there is a compelling government reason, advanced in the least restrictive means, to apply the prison regulation to the individual claimant." *Id.*

RFRA requires that the Government "demonstrate[]" its compelling interest and its use of the least restrictive means to accomplish that interest. In enacting RFRA, Congress explicitly stated that "the term 'demonstrates' means meets the burdens of going forward with the evidence and of persuasion." 42 U.S.C. § 2000bb-2. This Court concludes that the Government has fallen short of meeting its difficult burdens, which Congress requires. The Government has not shown that applying the CSA's prohibition on DMT to the UDV's use of hoasca furthers a compelling interest.[8] This Court cannot find, based on the evidence

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[8] The Tenth Circuit has very recently observed that "[w]hether something qualifies as a compelling interest is a question of law." *United States v. Hardman*, No. 99-4210, 2002 WL 1790584, at *8 (10th Cir. Aug.5, 2002), citing *Citizens Concerned About Our Children v. School Bd.*, 193 F.3d 1285, 1292 (11th Cir.1999); *Concrete Works of Colo., Inc. v. City and County of Denver*, 36 F.3d 1513, 1522 (10th Cir. 1994). However, in this case, there does not seem to be a dispute between the parties over whether, in the abstract, the federal government has a compelling interest in protecting the health and safety of people in the United States. Rather, the parties have focused their arguments on the issue of whether the

presented by the parties, that the Government has proven that hoasca poses a serious health risk to the members of the UDV who drink the tea in a ceremonial setting. Further, the Government has not shown that permitting members of the UDV to consume hoasca would lead to significant diversion of the substance to non-religious use. The Court bases its determinations on the following facts.

a. HEALTH RISKS TO MEMBERS OF THE UDV

The consumption of hoasca tea plays a central role in the practice of the UDV religion. Decl. of Jeffrey Bronfman, Exh. A. to Pltf. Mot. for Prelim. Inj., at 13. Hoacsa is a sacrament in the UDV. Church doctrine instructs that members can fully perceive and understand God only by drinking the tea. Pltf. Exh. 21, Decl. of David Lenderts, at 4. UDV members drink hoasca only during regular religious services, held on the first and third Saturdays of every month and on ten annual holidays. Decl. of Bronfman, at 8. A church leader called a "directing mestre" generally conducts the service. *Id.* at 9. Ceremonies start at 8 p.m. and last for about four hours. *Id.* at 8-10. The mestre begins the service by distributing measured glasses of tea to each participant. *Id.* at 10. Activities during UDV services include the recitation of church law by selected congregants, the singing of sacred chants by the mestre, question-and-answer exchanges between the mestre and participants, and a period of religious teaching led by the mestre. *Id.* at 10.

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Government has met its very heavy burden of showing that applying the CSA to the UDV's consumption of hoasca *furthers* the Government's stated interests.

Hoasca is brewed from two plants indigenous to the Amazon River Basin-*Banisteriopsis caapi* and *Psychotria viridis*. Pltf. Exh. 11, Decl. of Charles Grob, at 7. *Psychotria* contains dimethyltryptamine (DMT), a hallucinogenic chemical. *Id.* By itself, *psychotria* does not trigger an altered state of consciousness when taken orally, because monoamine oxidase (MAO) enzymes in the digestive system inactivate the DMT *psychotria* contains. *Id.* However, *banisteriopsis* contains harmala alkaloids, known as beta-carbolines, that inhibit MAO's and prevent the inactivation of DMT. *Id.*; Deft. Exh. ZZ, Rpt. of Sander Genser, at 6. Ingesting the combination of *psychotria* and *banisteriopsis* allows DMT to reach levels in the brain sufficient to produce a significantly altered state of consciousness. Deft. Exh. ZZ, Rpt. of Genser, at 6.

Scientists have devoted little research to the physical and psychological effects of ceremonial hoasca consumption. *Id.* The lack of knowledge about hoasca, relative to many other substances, forms the core of the dispute between the parties in this case. The Plaintiffs' experts and the Government's experts have offered differing interpretations of preliminary data, conflicting views on the value of comparisons between hoasca and other hallucinogenic drugs, and contrasting evaluations of whether certain findings signify risks associated with hoasca use. Ultimately, the Plaintiffs contend that evidence does not exist, to a reasonable degree of scientific certainty, to conclude that the UDV's religious use of hoasca carries any significant health risk. See, e.g., Hrg. Tr. at 207-08, testimony of Grob. The Government, in contrast, maintains that existing evidence suggests that the ingestion of hoasca poses substantial

health concerns. See, e.g., Deft. Exh. ZZ, Rpt. of Genser, at 5.

During the evidentiary hearing, the Plaintiffs presented the testimony of Dr. Charles Grob, Professor of Psychiatry at the University of California, Los Angeles. In 1993, Dr. Grob led a team of researchers in conducting a study of the effects of hoasca use on UDV members in Brazil. The study compared fifteen long-term members of the UDV, who had drunk hoasca for several years, with fifteen control subjects who had never used hoasca. Pltf. Exh. 11, Decl. of Grob, at 9-10. The researchers administered personality tests, psychiatric interviews, neuropsychological tests, and physical examinations to all of the subjects in the study. In addition, the subjects in the experiment group completed a hallucinogen rating scale questionnaire after they had participated in an hoasca ceremony. Researchers also conducted life story interviews with the members of the experimental group. *Id.*

The investigators reported their findings in a number of articles published in scientific journals. While acknowledging that the study was only preliminary, the researchers' overall assessment of the safety of hoasca use in the UDV was positive. Discussing the study, Dr. Grob stated that, despite its limitations, "our investigation did identify that in a group of randomly collected male subjects who had consumed ayahuasca for many years, entirely within the context of a very tightly organized syncretic church, there had been no injurious effects caused by their use of ayahuasca. On the contrary, our research team was consistently impressed with the very high functional status of the ayahuasca subjects." Pltf. Exh. 12, 2nd Decl. of Grob, at 1. Of particular interest to the researchers was that in the

life story interviews, many of the experimental subjects reported that they had engaged in self-destructive behavior before joining the UDV and that their experiences in the UDV had allowed them to lead responsible, meaningful lives. Pltf. Exh. 11, Decl. of Grob, at 12-13.

The Government has criticized the Plaintiffs' reliance on the 1993 hoasca study to show the safety of hoasca use. From a methodological standpoint, the Government's experts maintain, the hoasca study has many limitations. For example, the study employed a small sample size, the study included only male subjects, and the study provided no baseline data that researchers could use to compare information about subjects before and after participation in the hoasca rituals of the UDV. Deft. Exh. JJJ, Rpt. of Alexander Walker, at 6-8; Deft. Exh. ZZ, Rpt. of Genser at 6; Hrg. Tr. at 867-68, testimony of Genser; Hrg. Tr. at 743, testimony of Lorne Dawson.

The Government has also questioned whether long-time members of the UDV can be considered representative of UDV members in general. Dr. Alexander Walker, a Professor of Epidemiology at the Harvard School of Public Health, has expressed the view that selection bias undermined the value of the results generated through the hoasca study:

> According to Dr. Grob and his coinvestigators, UDV adherents abstain from alcohol and other intoxicating substances, they maintain high standards of responsibility to family and society, they are diligent, and they are respectful of their church's leadership. In selecting long-term members of the UDV as their study group, the Hoasca Project team necessarily included persons who were able to conform to the

> church's precepts over extended periods. There was no similar requirement for stable, long-term, willing church attendance in the comparison group. By itself, this one omission ensured that the *hoasca*-consuming group would have a favorable psychological profile.

Deft. Exh. JJJ, Rpt. of Walker at 6. Dr. Lorne Dawson, the Government's expert on religion, testified that restricting the sample to long-term, committed church members also creates methodological concerns because of problems that generally accompany the collection of conversion accounts in the sociology of religion. Dr. Dawson explained that:

> [C]onversion accounts, for example, almost always involve some kind of a somewhat exaggerated statement of what their preconversion life was like in terms of the sinfulness, perhaps, of their life or the ways in which they engaged in harmful behavior or abused substances, as in this case. There is a tendency to exaggerate how bad one's life was before they joined the group. Then too, perhaps they also exaggerate how good life is now that they have joined the group or been involved with the group.

Hrg. tr. at 745-46. Dr. Dawson stated that a superior sample would include people who have belonged to the church for a short time and people who have left the church under a range of circumstances, in addition to long-time church members. *Id.* at 746-47.

In addition to pointing out the methodological limitations of the 1993 hoasca study, the Government has articulated a number of concerns regarding the UDV's

ceremonial consumption of hoasca. Dr. Sander Genser,[9] one of the Government's experts, stated in his report that "existing studies have raised flags regarding potential negative physical and psychological effects" of hoasca. Deft. Exh. ZZ, Rpt. of Genser, at 8. Some concerns derive from potential dangers associated with DMT, hoasca's main psychoactive component. For example, Dr. Genser has cited a study in which Dr. Rick Strassman administered intravenous DMT to test subjects. Two subjects experienced such a high rise in blood pressure that Dr. Strassman determined that researchers should not include individuals with a history of hypertension in studies of DMT. *Id.* Another of the subjects in Dr. Strassman's study suffered a recurrence of depression. *Id.*

According to Dr. Genser, concerns about the safety of hoasca stem not just from information known about other forms of DMT, but also from information known about other types of hallucinogenic substances. *Id.* Dr. Genser has listed a broad range of adverse neuropsychological effects that have been linked to hallucinogen use. For instance, Dr. Genser has described some dangers associated with lysergic acid diethylamide (LSD), another hallucinogenic substance that shares pharmacological properties with DMT. *Id.* at 8-10 Particularly in individuals with pre-existing psychopathology, LSD may produce prolonged psychotic reactions. *Id.* at 9. Users of LSD may also be at risk for developing persisting perpetual disorder, known as "flashbacks," in which individuals reexperience the

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[9] Dr. Genser is the Chief of the Medical Consequences Unit of the Center on AIDS and Other Medical Consequences of Drug Abuse at the National Institute on Drug Abuse, National Institutes of Health.

effects of LSD at times when they are not actually under the influence of the drug. *Id.* at 9-10.

The Plaintiffs dispute that evidence concerning intravenous DMT and evidence about hallucinogens other than DMT represent strong indications that the UDV's ceremonial hoasca use carries significant risk. With respect to the studies of intravenous DMT, the Plaintiffs' experts have emphasized that differences in the method of the administration of DMT translate into important differences in how the drug is experienced. Intravenous DMT has a much more rapid onset, and its effects are of much shorter duration, than hoasca taken orally. Dr. David Nichols, Professor of Medicinal Chemistry and Molecular Pharmacology at Purdue University, has observed that "[o]rally ingested hoasca produces a less intense, more manageable, and inherently psychologically safer altered state of consciousness." Pltf. Exh. 24, Decl. of Nichols, at 7; see also Pltf. Exh. 12, 2nd Decl. of Grob, at 2. Further, Dr. Nichols has questioned whether Strassman's study suggests that even intravenous DMT causes hypertension. At the evidentiary hearing, Dr. Nichols testified that "if you look at the pharmacology of DMT, there aren't serotonin site receptors in the heart and cardiovascular system that would normally produce life-threatening cardiovascular changes," and that in the case of the hypertension reported by Strassman, "one could argue that that response was related to the stress of the high dose." Hrg. Tr. at 1145.

Regarding the Government's evidence about the risks presented by other hallucinogens, such as LSD, the Plaintiffs have noted the lack of evidence connecting hoasca use with flashbacks. Dr. Grob has stated that "[m]y medical colleagues in the UDV inform me

that they have never received a report of persisting perpetual disorder ('flashbacks') induced by ayahuasca," and that "I have also heard of no such report from any other source." Pltf. Exh. 12, 2nd Decl. of Grob, at 3. As to other negative neuropsychological effects identified with the use of hallucinogenic drugs, the Plaintiffs have pointed to distinctions between hoasca and other hallucinogens that may reduce the possibility that hoasca would induce adverse reactions. The Plaintiffs note, for example, that the duration is shorter and the intensity more mild for hoasca experiences, as compared to some other classic hallucinogens. Pltf. Exh. 12, 2nd Decl. of Grob, at 3.

Further, the Plaintiffs emphasize that the circumstances under which an individual takes a hallucinogenic drug, the "set and setting," are crucial in determining the kind of experience that the individual has. See, e.g., Hrg. Tr. at 1182-83, testimony of Nichols. Referring to the 1993 hoasca study, Dr. Grob has commented that "[i]t was the consistent observation by members of our research team that the UDV had constructed a ceremonial structure for their ritual use of hoasca that optimized safety and minimized the likelihood of adverse consequences." Pltf. Exh. 11, Decl. of Grob, at 5. The Plaintiffs call attention to the fact that the UDV employs a range of measures from screening new church members for psychological instability to observing members for problems during church ceremonies-to protect the safety of individuals ingesting hoasca. *Id.*

Along with evidence about DMT and other hallucinogens in general, the Government has presented evidence more specific to the hoasca ingested in the UDV. Both parties have devoted a substantial amount of

attention to a potential danger acknowledged even by the Plaintiffs—adverse drug interactions. This danger stems from the presence of the component of hoasca contributed by *banisteriopsis*—beta carbolines. Deft. Exh. ZZ, Rpt. of Genser, at 11. Individuals who drink hoasca while on certain medications may be at increased risk for developing serotonin syndrome, a condition characterized by excessive levels of the neurotransmitter serotonin. For example, several types of antidepressants, such as Prozac, contain selective serotonin reuptake inhibitors (SSRI's). SSRI's trigger the release of serotonin or prevent its reuptake. Hrg. tr. at 253, testimony of Grob. Monoamine oxidase inhibitors interfere with the metabolization of serotinin, and as described above, hoasca has MAO-inhibiting effects. Pltf. Exh. 11, Decl. of Grob, at 6. Drinking hoasca while on an SSRI might create a dangerous interaction, because the MAOI's in hoasca would hinder the metabolization of the greater levels of serotonin made available through the use of the SSRI. In discussing the risk of serotonin syndrome, the Government's experts noted that "irreversible" MAO inhibitors—those that "bind to an MAO molecule and destroy its function forever"—may interact harmfully with a number of medicines, as well as with a chemical found in some common foods. Govt. Exh. ZZ, Rpt. of Genser, at 12. Irreversible MAO inhibitors are often present in anti-depressant medications. *Id.*

Although the Plaintiffs concede that adverse drug interactions represent a risk connected with hoasca use, they dispute that the risk is so substantial as to require the Government to prohibit the religious consumption of the tea. The Plaintiffs' experts have cited the following reasons for arguing that the Government has over-

stated the danger of adverse drug interactions involving hoasca. First, the Plaintiffs maintain that hoasca does not contain *irreversible* MAO inhibitors, the type associated with the most severe drug interactions. Dr. Grob has written that that "[u]nlike pharmaceutical MAOI's . . . the MAOI effect in ayahuasca is relatively mild, with comparatively lesser degrees of risk for dangerous interactions." Pltf. Exh. 12, 2nd Decl. of Grob, at 2. Dr. Grob has indicated that in the cases of reactions between ayahuasca and SSRI's with which he is familiar, "the duration of the event was relatively brief when compared to more severe cases of serotonin syndrome caused by combinations of SSRIs and pharmaceutical irreversible MAOIs." *Id.* Similarly, Dr. Nichols testified for the Plaintiffs that "the possibility of physiological consequences with the reversible MAO inhibitors is much reduced when compared with the irreversible." Hrg. tr. at 1219.

Second, the Plaintiffs have placed great emphasis on the attention that UDV leadership has paid to the danger of adverse drug interactions. Dr. Grob and his colleague, Dr. J.C. Callaway, first identified the potential for negative interactions between hoasca and SSRI's in a scientific article published in 1998. Pltf. Exh. 12, 2nd Decl. of Grob, at 2; Callaway, J.C. & Grob, C.S. (1998). Ayahuasca Preparations and Serotonin Reuptake Inhibitors: A Potential Combination of Severe Adverse Interaction. *J. Psychoactive Drugs*, *30.* Deft. Exh. KK. Dr. Grob has testified that the UDV has been receptive to concerns about adverse drug reactions. He wrote in his second declaration that "[f]ollowing discussions of our concerns with physicians of the UDV, all prospective participants in ceremonial hoasca sessions have been carefully interviewed to rule out the presence of

ancillary medication that might induce adverse interactions with hoasca." Pltf. Exh. 12, 2nd Decl. of Grob, at 6. See also Hrg. tr. at 254.

Finally, the Plaintiffs have attempted to downplay the risk of adverse reactions posed by hoasca use, contending that serotonin syndrome is quite rare and is not experienced by all individuals who ingest hoasca while taking SSRI's. Hrg. tr. at 442-46, testimony of Glaucus Brito. The Plaintiffs have portrayed the risk of serotonin syndrome associated with hoasca as falling within the normal spectrum of concerns with drug interaction. They point out that Government expert Dr. Genser stated, during the hearing, that he would be more troubled by a person drinking grapefruit juice while taking a contraindicated drug than by a UDV member taking hoasca in a ceremonial context. Hrg. tr. at 964.

The Government has identified other indications that the UDV's hoasca use is not as safe as the Plaintiffs claim. Data collected by DEMEC, the medical-scientific department of the Brazilian UDV, raises particular concern. Since 1996, DEMEC has gathered reports of cases of psychological problems experienced by church members from the three most heavily populated regions of Brazil. Hrg. tr. at 425-26, testimony of Brito. The organization's records include retrospective reports of cases that had occurred in the five years prior to 1996. *Id.* at 425. The DEMEC documents disclose that there have been 24 incidents of psychosis among users of hoasca in church ceremonies. Dr. Glaucus Brito, the director of DEMEC, testified that "[o]ut of these 24 cases, we have one in which the tea acts as a trigger with no prior occurrences, and then we have seven in which the tea acted as a resharpening mechanism for . . . a prior mental condition that was

not identified, but it was identified during the course of the investigation by the psychiatrist." Hrg. tr. at 424-25. Dr. Brito went on to explain that "out of these 24, there were 11 in which there was no relationship whatsoever between the event and the use of the tea." *Id.* at 425.

Dr. Genser has stated that the information contained in the DEMEC reports reinforces his belief that hoasca use in the UDV presents a significant risk of psychotic incidents. Dr. Genser testified that among the range of possible physical and psychological effects that could be associated with hoasca use, "psychosis is definitely of most concern," in terms of both severity and likelihood. Hrg. tr. at 960-61. Even if the percentage of psychotic episodes reported among UDV members was on the low end of the average range for the general Brazilian population, he explained:

> I would still be concerned because from all of the descriptions I have read, Dr. Brito's deposition, the UDV, the DEMEC documents, Mr. Bronfman's deposition, the UDV screens out a certain number of people with vulnerabilities to psychosis and provides an environment that tends to encourage healthier behaviors and healthier life-styles and provides a level of social connectedness for the individual that it's generally greater than the average member of the general population. All of those factors would, I believe, tend to lower the expected incidence of psychosis a good bit below that in the general population. So the fact that the incidence of psychosis is still within range of the general population, in combination with the fact that a number of those incidents reported are attributed to the

> hoasca really strengthened my concern about the hoasca.

Hrg. tr. at 862-63. Dr. Genser also stated that he would expect that cases of psychosis would be underreported to the DEMEC monitoring system. Hrg. tr. at 861.

The Plaintiffs deny that available evidence suggests that hoasca use is likely to cause severe psychotic events. Discussing the DEMEC documents, Dr. Grob commented that many of the reported psychiatric problems "were relatively transient in nature and resolved." Hrg. tr. at 251-52. In the "few cases of very serious mental illness," the individuals "appeared to have . . . long-standing problems insofar as their mental function." *Id.* at 252. Dr. Grob doubted whether hoasca was a "key precipitant" in several of the reported episodes "in many of these cases the hoasca seemed to be just coincidental to it." *Id.* In addition, Dr. Grob noted that "given how many people participate and how many years they have been trying to collect such data," the reports represent "a very small number of cases." *Id.* at 252-53.

The Plaintiffs presented the testimony of Dr. Brito in support of their argument that the rate of reported psychosis among UDV members in Brazil does not exceed the rate of psychosis in the general population. About one percent of the world's population is believed to be schizophrenic. Hrg. tr. at 439. The DEMEC records were generated from observations of about 1,400 to 1,500 individuals participating in UDV ceremonies. *Id.* at 438. If 13 of these people experienced psychotic episodes linked in some way to hoasca, this would represent only .9 percent of the observed participants. *Id.* Dr. Brito stressed that the figure of .9 percent is based on conservative methods of calculation.

*Id.* at 439-440. If the 1,400 people observed were drinking the tea twice a month during the years for which data was collected, calculating the number of psychotic events per number of hoasca exposures would result in a smaller percentage. *Id.*

The Government argues that research on UDV members suggests that hoasca may have negative physical effects as well as negative psychological effects. During the 1993 hoasca study, investigators found that eight of the fifteen subjects in the test group had cardiac irregularities, while only one subject in the control group had such irregularities. Hrg. tr. 504-05, testimony of Brito. The Plaintiffs counter that cardiac alterations detected are not necessarily linked with heart disease. For example, four of the eight test subjects had bradychardia, or slow heartbeat, a condition that is associated with young athletes as well as people with certain types of heart disease. Hrg. tr. at 504, testimony of Brito; Hrg. tr. at 878-79, testimony of Genser.

In discussing his concerns about hoasca use in his expert report, Dr. Genser cited a recent study conducted by Jordi Riba. J. Riba, et al. (2001). Subjective Effects and Tolerability of the South American Beverage Ayahuasca in Healthy Volunteers. *Psychopharmacology, 154,* 85-95. Deft. Exh. BBB. The researchers administered encapsulated ayahuasca, in increasing doses, to six volunteers. Riba and his colleagues reported that "one volunteer experienced an intensely dysphoric reaction with transient disorientation and anxiety at the medium dose and voluntarily withdrew from the study." *Id.* The Plaintiffs have questioned the applicability of the Riba study to an evaluation of the risks presented by the UDV's ceremonial consumption of hoasca. The Plaintiffs have observed that the con-

centrations of DMT and beta-carbolines in the ayahuasca capsules administered by Riba were stronger than the concentrations in the hoasca seized from the UDV. See Hrg. tr. at 871. The Plaintiffs also emphasize that the Riba study did not take place within a religious context, and that the anxiety experienced by the one test subject was only transient in nature. *Id.* at 875-76.

In considering the evidence submitted by the parties, this Court has been struck by the closeness of the questions of fact presented in this case. The Court has no doubt that in other contexts, the risks that the Government has identified would be sufficient to support a decision against allowing individuals to consume hoasca pending further study of the substance. Indeed, even the scientific experts testifying on behalf of the Plaintiffs appear to recognize the need for additional research into the health consequences of ceremonial hoasca use.

However, in this case, the Plaintiffs have raised a claim under a powerful statute passed by Congress specifically to override a ruling by the Supreme Court of the United States. The Government concedes, at this stage, that application of the CSA to the UDV's use of hoasca imposes a substantial burden on the practice of the Plaintiffs' religion. By passing RFRA, Congress required the Government to justify this imposition with a showing of a compelling government interest. As to the subject of health risks, the evidence presented by the parties is, essentially, in equipoise. This Court cannot find, in light of the closeness of the evidence, that the Government has successfully carried its onerous burden on the issue of health risks to UDV members.

b. POTENTIAL FOR DIVERSION TO NON-RELIGIOUS USE

The Government alleges that it has a compelling interest not just in protecting the physical and psychological health of the UDV members who wish to consume hoasca, but also in ensuring of the safety of individuals who might ingest hoasca in a non-ceremonial environment. If the UDV were allowed to use hoasca in its church services, the Government argues, the tea could be diverted to potentially harmful uses in non-religious, unsupervised settings. In contrast, the Plaintiffs take the position as articulated by their expert witness, Dr. Mark Kleiman that "[t]here is no currently available evidence to suggest that such [diversionary] effects, were they to occur, would be large." Pltf. Exh. 16, decl. of Kleiman, at ¶ 29.

The Government's analysis hinges on the factual premise that the hoasca used by the UDV would be vulnerable to diversion. To help establish this premise, the Government presented the expert opinions of Terrance Woodworth, Deputy Director of the Drug Enforcement Administration's Office of Diversion Control. Mr. Woodworth identified "several factors that are relevant to the assessment of a controlled substance's potential for diversion," including "the existence of an illicit market for the substance, . . . the existence of 'marketing' or publicity about the substance, and the form of the substance." Deft. exh. ZZZ, Rpt. of Terrance Woodworth, at 3. In addition, Mr. Woodworth stated, "[a] substance's potential for diversion is also affected by the opportunity for, and the cost of, diverting the substance, . . . the level of control placed upon the substance, the form of the

substance, and the degree to which the substance is in movement from place to place." *Id.* at 3-4.

The Government contends that the extent of the illicit market for hoasca would be determined, in large part, by whether hoasca has a significant potential for abuse. Dr. Donald Jasinski, one of the Government's expert witnesses, addressed this question from the pharmacological standpoint.[10] He expressed the opinion that the risk of abuse associated with hoasca is substantial. He supports his conclusion by pointing first to evidence about the reinforcing effects of DMT and hoasca. Positive reinforcing effects "are the transient alterations in mood, thinking, feeling, and perceptions produced by [a] drug," and these "effects include elevation in mood, pleasant thoughts, feelings of well being and relation, and perceptions that surroundings were more pleasant." Deft. Exh. VVV, Rpt. of Jasinski, at 7-8. These positive effects, called "euphoria," are the primary factors leading individuals to begin using, and to continue to use repeatedly, a drug of abuse. *Id.*

Dr. Jasinski noted that research on intravenous DMT indicates that the substance produces euphoric effects. In Strassman's study, the investigators "described the onset of psychological effects within two minutes with effects completely resolved within 30 minutes with transient anxiety common, replaced by euphoria." Deft. Exh. VVV, Rpt. of Jasinski, at 9. To the extent that preliminary research has been performed on ayahuasca, it appears that the substance induces effects similar to those created by DMT, "although the effects are slower in onset, milder in intensity, and longer in duration."

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[10] Dr. Jasinski is a Professor of Medicine at the Johns Hopkins School of Medicine.

The reported effects of ayahuasca "include pleasant feelings and elevations in mood as well as dysphoric (i.e., anxiety-producing) changes." *Id.*

Dr. Jasinski discussed not only the effects which suggest that hoasca would be subject to abuse, but also some effects which might seem to limit hoasca abuse. In particular, hoasca consumption often causes nausea and vomiting. While acknowledging that these effects may act as a deterrent to some individuals, Dr. Jasinski observed that it is unclear how many users experience nausea after taking hoasca. Hrg. tr. at 997. Further, Dr. Jasinksi pointed out, negative effects of substances do not necessarily outweigh the positive effects to the extent that potential users are completely deterred from taking the substances. Deft. Exh. VVV, Rpt. of Jasinski, at 9-10. In the case of ayahuasca, indigenous people in South America have ingested the substance for centuries despite its association with nausea and vomiting. Hrg. tr. at 999.

Dr. Jasinski stated that another source of evidence about the abuse potential of ayahuasca is information known about LSD, a related drug. DMT produces pharmacological effects similar to those produced by LSD. Although there are some differences between LSD and DMT, "[f]or the purpose of assessing abuse potential . . . the similarities . . . outweigh the differences," and "none of these differences necessarily detract from the abuse potential of DMT." Deft. Exh. VVV, Rpt. of Jasinski, at 12. Dr. Jasinski believes that DMT's pharmacological similarity to LSD, a drug recognized to have abuse potential, lends support to his opinion that ayahuasca has substantial abuse potential.

While Dr. Jasinski focused on ayahuasca's abuse potential from a pharmacological perspective, Mr.

Woodworth testified about patterns of drug use in the United States that indicate that ayahuasca carries a significant potential for abuse. During the evidentiary hearing Mr. Woodworth cited, for example, National Household Survey on Drug Abuse results showing that hallucinogen use in this country has risen substantially in recent years. Hrg. tr. at 1388; Deft. Exh. CCCC. Mr. Woodworth expressed the opinion that "[t]he existence of the well documented increasing interest in and demand for hallucinogens greatly increases the potential for abuse- and consequently diversion of any substance having hallucinogenic qualities." Deft. Exh. ZZZ, Rpt. of Woodworth, at 4.

Mr. Woodworth cited several reasons, in addition to hoasca's abuse potential, for believing that there would be a demand for hoasca in the illicit market. Advertisements for hoasca on the internet reflect growing interest in the drug, he testified. Hrg. tr. at 1392; Rpt. at 5; Exh. EEEE. Increased publicity will, in turn, generate even more interest. Rpt. at 5. Hoasca use in Europe, often a helpful indicator for determining the possibility of the diversion in the United States, has risen substantially in recent years. *Id.* Mr. Woodworth observed that hoasca's form- a tea- might contribute to the substance's draw. He reasons that "[d]rinking a cup of tea may appear more appealing to some abusers than chewing a dried plant material, as is the case with peyote, or shooting up, smoking, or snorting, as is done with many other substances of abuse." *Id.* at 5-6.

Mr. Woodworth attributes the relatively low level of ayahuasca abuse in the United States, at the present time, to the lack of availability of the plant components in this country. *Id.* at 6. Mr. Woodworth explained that if the UDV is permitted to import hoasca for their

religious ceremonies, the greater physical presence of the substance in the United States will increase the likelihood of diversion and abuse. *Id.* Further, the international transportation process itself will expose the tea to illicit diversion. Controlled substances shipped in international commerce are particularly vulnerable to diversion, whether through theft, loss, or fraud. *Id.* at 6-7. Controls imposed by the country of origin may help reduce the risk of diversion, Hrg. tr. at 1401, but in this case, the Brazilian government does not carefully regulate the UDV's production of ayahuasca. Hrg. tr. at 1403.

The Government has suggested that there are specific characteristics of the UDV that indicate that the hoasca shipped to the church would be prone to illegal diversion. For example, Mr. Woodworth noted at the evidentiary hearing that the federal government has established a cooperative, working relationship with the Native American Church in order to minimize the diversion of peyote. However, Mr. Woodworth doubts whether the government could build a similar relationship with the UDV:

> . . . based on their lack of candor with regard to what has been brought in for the last ten years. They have never contacted DEA. They have never attempted to get registered with DEA. They have never tried to have hoasca exempted from controlled status. And in the seizures, the documentation clearly was either disguised or mislabeled.

Hrg. tr. at 1424. The Government further supported this argument through the introduction of exhibits in the nature of UDV correspondence stressing the need for confidentiality about church sessions, and shipping

forms in which UDV leaders in the United States listed hoasca as "herbal extract." See, e.g., Deft. Exhs. NNNNN and RRRRR.

The Plaintiffs dispute the fundamental premises of the Government's arguments on the diversion issue. They maintain, first, that hoasca does not carry the significant potential for abuse that the Government attributes to the substance. Dr. Kleiman, the Plaintiffs' expert, takes the position that demand for hoasca would be relatively low, because of negative side effects associated with the substance and because of the availability of substitutes for hoasca.[11] Hrg. tr. at 680. Dr. Kleiman disagrees with Dr. Jasinski about the deterrent effect of hoasca's nauseant properties. Dr. Kleiman has written that "[w]hile many drug abusers tolerate a variety of inconveniences and discomforts associated with the drugs they take and the ways in which they take them, it is not reported that drug abusers as a class, or users of hallucinogens in particular, enjoy nausea or vomiting." Pltf. Exh. 16, Decl. of Kleiman, at ¶ 21. Dr. Kleiman explained that individuals using hallucinogens may be even less inclined to tolerate nausea than users of other types of drugs, by observing:

> According to the research literature, hallucinogenic substances, including DMT, score much lower on scales measuring reinforcement, and have much less tendency to create dependency, than opiates, such as heroin. That is, those exposed to hallucinogens once display far less motivation to experience second and subsequent doses than those exposed to

[11] Dr. Kleiman is a Professor of Policy Studies at the University of California, Los Angeles.

> opiates, and a far smaller proportion of them develop drug dependency as defined by accepted clinical criteria ("addiction"). This would suggest that a much smaller proportion of hallucinogen users than of opiate users would be so strongly driven to seek out the drug experience as to neglect the presence of side-effects.

*Id.* at ¶ 22.

Dr. Kleiman also stressed that individuals interested in experiencing the effects of oral DMT would not necessarily demand the particular tea preparation employed in UDV ceremonies. Rather, "any preparation that included DMT and a sufficient quantity of any monoamine oxidase inhibitor would suffice." *Id.* at ¶ 16. Plants that contain DMT and plants that contain harmala alkaloids are available in the United States. *Id.* at ¶ 18. Some of the alternative preparations combining DMT and haramala alkaloids do not induce nausea in the way that hoasca does. Dr. Kleiman thus believes that "the widespread availability of pharmacologically equivalent substitutes, some of them with fewer unwanted side-effects and less apparent legal risk, would greatly reduce the motivation to divert the sacramental material for purposes of drug abuse." *Id.* at ¶ 25.

Dr. Kleiman also mentioned other factors that would rend to prevent widespread diversion of hoasca from the UDV. First, the United States UDV is a very small church and would not be importing huge quantities of tea from Brazil only about 3,000 doses per year. Dr. Kleiman commented that, "[e]ven if, by some happenstance, all 3,000 doses were diverted and you would ask me as a drug policy expert: Did a big disaster just

happen or not, I would say no, not a very big disaster." Hrg. tr. at 696.

Second, the relative "thinness of the potential market" for hoasca would reduce the likelihood of diversion that might occur with widely-used drugs. Hrg. tr. at 697. A casual thief in possession of a pharmaceutical cocaine shipment would have little trouble locating a buyer. In contrast, an individual would probably need to have some specific knowledge about the extremely limited hoasca market in order to distribute the tea. According to Dr. Kleiman, the nature of the hoasca market may thus discourage potential diversion of the tea to illicit use. Hrg. tr. at 698-99.

Third, the bulky form of hoasca would deter diversion. The 3,000 doses of tea that the UDV might import per year would produce several hundred liters of liquid. Dr. Kleiman testified that there is an inverse relationship between the volume of a substance and its susceptibility to theft. During the evidentiary hearing, he stated that "[t]he ease of stealing goes up as the volume goes down. The larger the volume, the harder something is to steal." Hrg. tr. at 718.

Finally, Dr. Kleiman emphasized that the UDV has a strong motivation for keeping the hoasca supply from being diverted. The tea "is considered a sacrament within the UDV, and its use outside the ceremonial religious context of the church is considered by members of the UDV to be sacrilegious." Pltf. Exh. 16, Decl. of Kleiman, at ¶ 26. Dr. Kleiman believes that the UDV's interest, under church doctrine, in preventing hoasca from being used improperly would make it likely that the church would cooperate with governmental authorities to track down any tea that is diverted. Hrg. tr. at 703.

As on the issue of health risks to UDV members, the parties have presented virtually balanced evidence on the risk of diversion issue.[12] Again, this Court finds that the Government has failed to meet its difficult burden of showing a compelling interest in preventing the diversion of hoasca to illicit use.

c. 1971 CONVENTION ON PSYCHOTROPIC SUBSTANCES

Upon its initial review of the parties' briefs, the Court believed that the Government's strongest arguments for prohibiting the UDV's use of hoasca stemmed from concerns about the safety of drinking the tea in a religious setting and the problems that might emerge if hoasca were diverted to use in non-religious settings. For that reason, the Court asked the parties to present evidence on these two subjects during the hearing held in October and November, 2001. However, the Government has alleged a third compelling interest in addition to those addressed at the hearing. According to the Government, the United States must apply the CSA's ban on DMT to the UDV's use of hoasca in order to adhere "to an important international treaty obligation." Response, at 16.

The United Nations Convention on Psychotropic Substances, represents an international effort "to prevent and combat abuse of [psychotropic] substances and the illicit traffic to which it gives rise." United Nations Convention on Psychotropic Substances, 1971, opened for signature February 21, 1971, 32 U.S.T. 543, 1019 U.N.T.S. 175, at Preamble. The treaty was opened for signature in 1971, entered into force in 1976, and was

[12] The Court notes that the specificity of Dr. Kleiman's analysis may even tip the scale slightly in favor of the Plaintiffs' position.

ratified by the United States in 1980. Decl. of Robert Dalton, Exh. B. to Deft, Response, at ¶ 3. More than 160 nations are party to the treaty, including Brazil. The treaty adopts a scheduling system for substances similar to that found in the CSA. DMT is listed in Schedule I, the category subject to the strictest controls. Article 7 provides that parties to the treaty "[p]rohibit all use" of Schedule I substances, "except for scientific and very limited medical purposes." Article 7(a). Parties must also "[p]rohibit export and import" except under very restrictive conditions. Article 7(f).

The Government asserts that the Convention on Psychotropic Substances requires the United States to ban the UDV's ceremonial consumption of hoasca. Article 3(1) of the treaty makes clear that "a preparation is subject to the same measures of control as the psychotropic substances which it contains." The treaty defines a preparation as "[a]ny solution or mixture, in whatever physical state, containing one or more psychotropic substances." Article 1(f)(i). The Government appears to contend that even if the treaty's prohibition on DMT did not include hoasca tea, the provisions regarding "preparations" clearly extend the treaty's coverage to hoasca.

The Government notes that the treaty permits exceptions for the religious use of drugs, but argues that those exceptions are not applicable to the UDV. Article 32(4) reads:

> A State on whose territory there are plants growing wild which contain psychotropic substances from among those in Schedule I and which are traditionally used by certain small, clearly determined groups in magical or religious rites, may, at the time

> of signature, ratification or accession, make reservations concerning these plants, in respect of the provisions of article 7, except for the provisions relating to international trade.

The United States could not have relied on this provision to justify permitting the religious use of hoasca because, among other reasons, the plant ingredients of hoasca are not indigenous to this country. The Government argues that the treaty's specific allowance for religious exceptions under particular circumstances implies that the treaty does not permit other exceptions for religious use of scheduled substances.

Abiding by the terms of the Convention on Psychotropic Substances is, the Government maintains, a compelling interest. In general, principles of international law instruct that nations must honor the obligations imposed through treaties. For example, the Vienna Convention on the Law of Treaties states that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith." Decl. of Dalton, Exh. B. to Deft. Response, at ¶ 10. The Government takes the position that the United States has a particular interest in adhering to the Convention on Psychotropic Substances. The United States calls on the treaty to elicit cooperation from other nations in fighting international drug trafficking. According to the Government, breaching the obligations set forth in the Convention would undermine the United States' efforts to encourage other nations to comply with the agreement, and might interfere with the willingness of other nations to form treaties with the United States in the future. *Id.* at ¶ 12.

In responding to the Government's position, the Plaintiffs challenge whether the Convention on Psy-

chotropic Substances actually applies to hoasca. The Plaintiffs point out that there are several indications that plants containing scheduled hallucinogenic substances are not necessarily prohibited under the treaty. The Commentary on the Convention on Psychotropic Substances, published by the United Nations in 1976, suggests that the listing of a chemical component in the treaty does not imply that a plant containing that chemical is likewise banned. For example, the Commentary notes that:

> Schedule I does not list any of the natural hallucinogenic materials in question, but only chemical substances which constitute the active principles contained in them. The inclusion in Schedule I of the active principle of a substance does not mean that the substance itself is also included therein if it is a substance clearly distinct from the substance constituting its active principle. Neither the crown (fruit, mescal button) of the Peyote cactus nor the roots of the plant Mimosa hostilis nor Psilocybe mushrooms themselves are included in Schedule I, but only their respective active principles, mescaline, DMT and psilocybine.

Commentary, at 387. Elsewhere, the Commentary states that "[p]lants as such are not, and it is submittedare also not likely to be, listed in Schedule I, but only some products obtained from plants." *Id.* at 385.

Under the interpretation of the Convention favored by the Plaintiffs, the treaty included a provision allowing nations to reserve some religious uses of indigenous plants so that parties could ensure that any scheduling of plants in the future would not interfere with certain religious practices; the reservation provision was not inserted because plants are presently illegal under the treaty. The Commentary provides support for this

analysis, noting that because there is a possibility "that the fruit of the Peyote cactus, the roots of Mimosa hostilis, Psilocybe mushrooms or other hallucinogenic plant parts used in traditional magical or religious rites will in the future be placed in Schedule I," that parties could "make a reservation assuring them the right to permit the continuation of the traditional use in question." *Id.* at 387.

Certainly the United States Senate Committee on Foreign Relations, when it recommended the ratification of the Convention, seemed to hold the view that plants were not automatically covered through the listing of their chemical components. The Committee's report stated that:

> Since mescaline, a derivative of the peyote cactus, is included in Schedule I of the Convention, and since the inclusion of peyote itself as an hallucinogenic substance is possible in the future, the Committee accepted the Administration's recommendation that the instrument of ratification include a reservation with respect to peyote harvested and distributed for use by the Native American Church in its religious rites.

S. Exec. Rept. No. 96-29, Convention on Psychotropic Substances, 96th Cong., 2d. Sess., at 4 (1980).

In addition, the Plaintiffs provide examples of how, in operation, the treaty seems to reflect the understanding that the listing of a hallucinogenic chemical does not imply the listing of a plant containing that chemical. While the United States made a reservation for the use of peyote by the Native American Church within this country, under Article 32(4), it did not make a reservation to export peyote for use by religious groups in

other countries. However, the United States apparently permits the exportation of peyote to Native American Church groups in Canada. See 37 Tex. Admin. Code §§ 13.81-87; Exh. T to Pltf. Reply (list of Canadian Native American Church organizations registered with the Texas Department of Public Safety.) Exportation of a Schedule I substance for other than scientific or medical purposes would appear to violate the Convention, in the absence of a reservation. The conduct of the parties to the Convention, concerning the export of peyote, therefore suggests that peyote is not a scheduled substance, although mescaline is.

The Plaintiffs present a very persuasive analysis as to why plants containing hallucinogenic chemicals are not necessarily covered within Schedule I of the Convention. As the Defendants have emphasized, though, and as this Court noted above, the treaty contains special provisions regarding preparations: "a preparation is subject to the same measures of control as the psychotropic substance which it contains." Article 3(1). In applying the treaty to hoasca, it would be possible to conclude that even if Schedule I does not cover *psychotria viridis*-the plant component of hoasca that contains DMT Schedule I does extend to hoasca tea under the treaty's "preparation" provision. To counter this proposition, the Plaintiffs have offered strong arguments concerning why, if the treaty does not extend to *psychotria viridis*, the treaty would not extend to a tea made from a combination of *psychotria viridis* and another plant.

First, the Plaintiffs rely on the statement in the Commentary to the Convention, quoted above, that "[t]he inclusion in Schedule I of the active principle of a substance does not mean that the substance itself is

also included therein if it is a substance clearly distinct from the substance constituting its active principle." Commentary, at 387. The Plaintiffs maintain that hoasca is clearly distinct from DMT, just as *psychotria viridis* is, and that there are no indications that the tea-making process produces a chemical separation of DMT.

Second, the Plaintiffs point out that the Commentary appears to assume that infusions and beverages made from plants containing hallucinogenic substances do not fall within Schedule I. In noting that "[n]either . . . the roots of the plant Mimosa hostilis nor Psilocybe mushrooms themselves are included in Schedule I, but only their respective active principles," the Commentary observes by footnote that "[a]n infusion of the roots is used" to consume Mimosa hostilis, and that "[b]everages . . . are used" to consume Psilocybe mushrooms. Commentary, at 387; nn.1227-28.

Based on the analysis offered by the Plaintiffs, this Court finds that the 1971 Convention on Psychotropic Substances does not apply to the hoasca tea used by the UDV.[13] Therefore, the United States' interest in adhering to the Convention does not, in this case, repre-

[13] This Court acknowledges that its conclusion that the Convention on Psychotropic Substances does not extend to hoasca, without explanation, may appear to conflict with its interpretation of a similar provision in the CSA. However, the Convention significantly differs from the CSA in that the Convention introduces on its face, through the reservation provision, the proposition that plants may receive different treatment than chemical components. Given this, the Court felt it appropriate to turn to the Commentary, which makes clear that, unlike the CSA, the scheduling of a hallucinogenic chemical in the Convention does not imply the scheduling of a plant that contains that chemical.

sent a compelling reason for extending the CSA's ban on DMT to the UDV's ceremonial hoasca use.

2. LEAST RESTRICTIVE MEANS

Under RFRA, the Government must establish not only that a burden placed on an individual's religious practice "is in furtherance of a compelling governmental interest," but also that the burden "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). In this case, the Court has concluded that the Government has failed to carry its heavy burden of showing a compelling government interest in protecting the health of UDV members using hoasca or in preventing the diversion of hoasca to illicit use. In addition, the Government has not demonstrated that prohibiting the UDV's ceremonial use of hoasca furthers an interest in adhering to the 1971 Convention on Psychotropic Substances, because the treaty does not appear to extend to hoasca. The Court thus does not reach the question of whether the Government has employed the least restrictive means of accomplishing its stated goals.

IV. REMAINING REQUIREMENTS FOR PRELIMINARY INJUNCTION

The Court has found that the Plaintiffs have demonstrated a substantial likelihood of success as to their RFRA claim. As this Court noted in its discussion of the standard of review, parties seeking preliminary injunctions must show not only a substantial likelihood of success on the merits, but also that there will be "irreparable injury to the movant if the preliminary injunction is denied," that "the threatened injury to the movant outweighs the injury to the other party under the preliminary injunction," and that "the injunction is

not adverse to the public interest." *Kikumura*, 242 F.3d at 955.

With respect to the first of these other requirements, Tenth Circuit law indicates that the violations of the religious exercise rights protected under RFRA represent irreparable injuries. In *Kikumura*, the Tenth Circuit observed that "courts have held that a plaintiff satisfies the irreparable harm analysis by alleging a violation of RFRA." *Id.* at 963. In support of this proposition the *Kikumura* court quoted the Second Circuit, which has held that "although the plaintiff's free exercise claim is statutory rather than constitutional, the denial of plaintiff's right to the free exercise of his religious beliefs is a harm that cannot be adequately compensated monetarily." *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996).

The Tenth Circuit's emphasis on the harms presented by the violation of religious rights, reflected in the *Kikumura* case, also informs this Court's conclusions regarding whether the Plaintiffs have met the remaining two requirements for preliminary injunction. This Court acknowledges that the Government has presented a great deal of evidence suggesting that hoasca may pose health risks to UDV members and may be subject to diversion to non-religious use. However, in balancing the Government's concerns against the injury suffered by the Plaintiffs when they are unable to consume hoasca in their religious ceremonies, this Court concludes that, in light of the closeness of the parties' evidence regarding the safety of hoasca use and its potential for diversion, the scale tips in the Plaintiffs' favor. Likewise, this Court believes that an assessment of whether a preliminary injunction would be adverse to the public interest must take into account the pub-

lic's interest in the vindication of the religious freedoms protected under RFRA a statute which Congress, as the representative of the public, enacted specifically to countermand a Supreme Court ruling. See, e.g., *Elam Constr., Inc. v. Regional Transp. Dist.*, 129 F.3d 1343, 1347 (10th Cir. 1997) (stating in the context of a Constitutional claim that "[t]he public interest . . . favors plaintiffs' assertion of their First Amendment rights.") This Court thus concludes that the Plaintiffs have satisfied the requirements for preliminary injunction as to their RFRA claim.

## V. CONCLUSION

The Plaintiffs have failed to establish a likelihood of success on the merits of their claims under Equal Protection principles, the Free Exercise of the First Amendment to the United States Constitution, canons of statutory construction, and the international law of comity. However, the Court has concluded that the Plaintiffs are likely to succeed on the merits of their claim under RFRA. In addition, the Plaintiffs have satisfied the other requirements for preliminary injunction on the basis of their RFRA claim.

This Court has scheduled a hearing on August 19, 2002 to discuss with counsel issues concerning the nature and implementation of the preliminary injunctive relief to which the Plaintiffs are entitled. The Court will address the Plaintiffs' APA argument at that time, as well as the Plaintiffs' contention that the Fourth and Fifth Amendments to the United States Constitution require the Government to return to the UDV the hoasca confiscated by the Government.

IT IS THEREFORE ORDERED that:

1) The Plaintiffs' Motion for Preliminary Injunction (Doc. No. 10) is denied as to:

a) Their claim under the First Amendment to the United States Constitution;

b) Their claim that the CSA does not apply to hoasca;

c) Their claim that principles of international law require that the Government permit the UDV's hoasca use; and

d) Their claim under the Equal Protection Clause of the Fourteenth Amendment, made applicable to federal statutes by the Due Process Clause of the Fifth Amendment.

2) The Plaintiffs' Motion for Preliminary Injunction is granted as to their claim under the Religious Freedom Restoration Act;

3) A hearing on the form of preliminary injunction is set for August 19, 2002 at 1:30 p.m.

**APPENDIX F**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

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No. CV 00-1647 JP/RLP

O CENTRO ESPIRITA BENEFICIENTE
UNIAO DO VEGETAL, ET AL., PLAINTIFFS

*v.*

JOHN ASHCROFT, ET AL., DEFENDANTS

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[Filed: Nov. 13, 2002]

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**PRELIMINARY INJUNCTION**

This matter came before the Court for hearing on the motion of Plaintiffs for preliminary injunction. After considering all the evidence admitted in support of and in opposition to Plaintiffs' motion, and having considered the arguments and briefs of counsel, the Court entered its Memorandum Opinion and Order of August 12, 2002. The Court's Memorandum Opinion and Order is incorporated herein by reference.

As set forth in the August 12 Memorandum Opinion and Order, the Court concludes that plaintiffs have met the standards necessary for preliminary injunctive relief:

First: The plaintiffs have demonstrated a substantial likelihood of success on the merits of their claim under

the religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb.

Second: The plaintiffs will suffer irreparable harm as a result of the impact of the defendants' conduct on the plaintiffs' ability to practice their religion unless the defendants are preliminarily enjoined from further interfering with the plaintiffs' practice of their religion.

Third: The threatened injury to the plaintiffs outweighs any injury to the defendants resulting from this injunction.

Fourth: The public interest in the vindication of religious freedoms favors the entry of a preliminary injunction.

The Court therefore preliminarily enjoins Defendants as follows, and under the terms and conditions set forth below, from prohibiting or penalizing the sacramental use of *hoasca* by participants in bona fide religious ceremonies of the O Centra Espirita Beneficiente Uniao Do Vegetal (UDV).

1. The Defendants, their agencies, agents, employees, and those persons under their control are preliminarily enjoined from directly or indirectly treating Plaintiffs' importation, possession, and distribution of *hoasca* for use in bona fide religious ceremonies of the UDV as unlawful under the Controlled Substances Act ("CSA"). During the pendency of this injunction, the Defendants, their agencies, agents, employees, and those persons under their control shall not intercept or cause to be intercepted shipments of *hoasca* imported by the UDV for religious use, prosecute or threaten to prosecute the UDV, its members, or bona fide participants in UDV ceremonies for religious use

of *hoasca*, or otherwise interfere with the religious use of *hoasca* by the UDV, its members, or bona fide participants in UDV ceremonies, subject to the terms and conditions set forth below.

2. Plaintiffs shall conduct themselves in accordance with the conduct that is described in the laws and regulations governing the importation and distribution of Schedule I Controlled Substances as set forth at 21 U.S.C. §§ 801-971 and 21 C.F.R. §§ 1300-1316, except as indicated below. Where this Order enjoins or modifies the application of a particular regulatory provision, the corresponding statutory provision shall be enjoined or modified accordingly. The Court preliminarily enjoins the Defendants from imposing on plaintiffs regulatory or other requirements, which by their terms apply to the importation, distribution, possession or religious use of *hoasca*, not set forth in this Order, without further order of the Court. This prohibition shall not be construed to bar the United States Customs Service from discharging its normal duties with respect to the general oversight of international commerce.

3. By requiring the Plaintiffs to abide by the conduct set forth in the identified regulations, the Court makes no decision regarding whether the application of any such requirements does or does not violate the RFRA; nor does the Court decide whether any future enforcement of these requirements by DEA against the Plaintiffs will or will not violate RFRA. Similarly, by enjoining Defendants from requiring Plaintiffs to adhere to certain conduct set forth in the identified regulations, the Court makes no decision regarding whether the

application of any such requirements would or would not violate the RFRA.

4. Defendants are enjoined from requiring the Plaintiffs to conform their conduct to the following regulations: 21 C.F.R. §§ 1301.34(a), 1301.34(b)(3), 1301.34(b)(5), 1301.34(b)(6), 1301.34(d), 1301.34(e), 1301.34(f), 1301.35(b), Part 1303, 1304.33, and 1312.13(a).

5. In applying for registration to import and distribute a controlled substance, Plaintiffs may strike out the word "business" on the relevant application form and specify that they are importing and distributing *hoasca* for religious purposes only. This modification of the form may not be deemed inconsistent with the requirements of 21 C.F.R. §§ 1301.13(i) or 1301.14(b). The Central Office of the UDV shall apply for registration as an importer, with distribution being a coincidental activity. The Central Office shall also apply on behalf of each individual congregation for registration as a distributor.

6. Where the relevant application form asks for information pertaining to "any officer, partner, stockholder or proprietor" of the UDV, these terms shall be deemed to apply to the officers of the UDV as specified in the records of the New Mexico Corporation Commission at the time of application for registration.

7. If requested by DEA pursuant to 21 C.F.R. §§ 1301.14(d), 1301.15, or 1312.13(d), Plaintiffs shall provide the identities and social security numbers of those persons within the UDV who routinely handle *hoasca* outside of ceremonies. Plaintiffs

shall not be required to provide the identities or social security numbers of any other UDV members.

8. Inasmuch as persons of authority within the UDV are not UDV "employees," the requirements of 21 C.F.R. §§ 1301.90-93 shall not apply. Instead, Plaintiffs are required to adhere to the conduct set forth in those sections, replacing the word "employee" with "person of authority within the UDV," defined as UDV members who are authorized to handle *hoasca* outside of ceremonies.

9. Inasmuch as persons of authority within the UDV are not UDV "employees," 21 C.F.R. § 1301.72(d) shall not apply. Instead, Plaintiffs are required to adhere to the following conduct: If someone, other than a person of authority within the UDV, is present in the room in which the hoasca is stored or a vehicle in which the hoasca is being conveyed (other than delivery by common carrier), that person shall be accompanied at all times by a person of authority within the UDV.

10. The requirements in 21 C.F.R. § 1312.12(a)(5) will be construed to mean that the Central Office of the UDV in Santa Fe, as importer, will measure its stock of *hoasca*, which will not include the *hoasca* in the possession of other registered locations.

11. The information required under 21 C.F.R. § 1312.12(a)(8) may be stated in liters or other measure of volume rather than kilograms.

12. The physical inventories referenced in 21 C.F.R. § 1316.03(c) shall be conducted by DEA, except that the actual handling of the containers of *hoasca* will be by the responsible UDV represen-

tatives under the direction and oversight of DEA personnel.

13. If DEA asks to inspect an item or items pursuant to 21 C.F.R. § 1316.03(f), and Plaintiffs believe that DEA's inspection of such item or items would violate their right to freedom of association or the freedom of association of others associated with the UDV, Plaintiffs may withhold such items from inspection pending a determination by this Court of whether they may be lawfully inspected.

14. The requirements of 21 C.F.R. § 1316.05 that inspections be carried out at reasonable times and in a reasonable manner applies to inspections authorized under 21 C.F.R. § 1316.03 and shall be construed to prohibit inspections during bona fide religious ceremonies of the UDV.

15. In lieu of the requirements in 21 C.F.R. § 1307.21(b), Plaintiffs and Defendants shall arrive at a mutually acceptable means of disposal of any hoasca that must be disposed of, which means shall not include forfeiture to Defendants.

16. Defendants are enjoined from requiring Plaintiffs to specify the amount of dimethyltryptamine (DMT) to be imported in their application for an import permit, as provided for under 21 C.F.R. § 1312.12(a). Plaintiffs shall instead specify the volume of *hoasca* to be imported, and indicate that the concentration of DMT in the imported *hoasca* is the concentration contained in the sample provided to DEA.

17. Plaintiffs shall assign a unique identifying number to each batch of *hoasca* that is received through international shipment. Immediately upon receipt

of such shipment, Plaintiffs shall extract an unadulterated small sample (not significantly more or less than 60 ml) from each batch shipped, and shall label each sample with the number of the batch from which it was taken. Plaintiffs shall also arrange to have a small sample of each batch of shipped *hoasca* preserved in Brazil, labeled with the number that corresponds to the batch of *hoasca* from which the sample was taken. These samples shall be made available to DEA on request, and shall in any case be preserved for a period of three (3) years. Any untested samples made available to DEA shall be returned to the Plaintiffs after three years.

18. Each container of *hoasca* in Plaintiffs' possession and control will be labeled with the number of the batch with *hoasca* originating from a different batch, the resulting mix shall be stored in containers labeled with the numbers of any and all originating batches and the precise volume that was taken from each such batch.

19. Defendants are enjoined from denying Plaintiffs' applications for registration to import and distribute hoasca or for an import permit on the grounds that Plaintiffs' religious use of hoasca is prohibited by the CSA and/or international treaties, conventions, or protocols (21 C.F.R. § 1301.34(b)); is inconsistent with state and/or local law (21 C.F.R. § 1301.34(b)(2)); or is inconsistent with public health and safety (21 C.F.R. § 1301.34(b)(7)).

20. Defendants are enjoined from denying Plaintiffs' applications for registration to import and distribute hoasca or for an import permit on any of the

following grounds: (a) the government must restrict importation to a number of establishments which can produce an adequate and uninterrupted supply of *hoasca* under adequately competitive conditions (21 C.F.R. § 1301.34(b)(1)); (b) importation of *hoasca* by Plaintiffs would not promote technical advances in the art of manufacturing *hoasca* and developing new substances (21 C.F.R. § 1301.34(b)(3)); (c) Plaintiffs lack sufficient past experience in the manufacturing of controlled substances (21 C.F.R. § 1301.34(b)(5)).

21. Defendants are enjoined from enforcing 21 C.F.R. § 1301.34(b)(6) to restrict the amounts of *hoasca* imported by Plaintiffs.

22. Defendants are enjoined from charging Plaintiffs an application fee in connection with their applications for registration to import and distribute hoasca, and from enforcing 21 C.F.R. § 1301.21(b) against Plaintiffs. To the extent that Plaintiffs' nonpayment of an application fee is inconsistent with any of the requirements of 21 C.F.R. §§ 1301.13(e) or 1301.14(a), those requirements shall not be enforced.

23. Defendants are enjoined from enforcing the specific storage requirements of 21 C.F.R. § 1301.72(a) and are enjoined from enforcing 21 C.F.R. § 1301.71(a) insofar as that subsection would require Plaintiffs to employ materials and construction which provide a structural equivalent to the physical security controls set forth in 21 C.F.R. §§ 1301.72, 1301.73 and 1301.75.

24. The initial on-site inspection by the Drug Enforcement Administration (21 C.F.R. § 1301.31) of each

UDV location applying for registration will take place within two (2) weeks of receipt of the application for registration of that location. The hoasca will be stored in a pad-locked refrigerator in a locked room at each UDV location where it is stored. The highest Church authority at each location will retain custody of the keys to the locks for the refrigerator and to the room where the hoasca is stored. If DEA after is on-site inspections takes the position that Plaintiffs' security measures are not in substantial compliance with the DEA's regulatory standards for the physical security controls and operating procedures necessary to prevent diversion of the *hoasca*, and if DEA and Plaintiffs are unable to agree on a mutually acceptable means and time frame for resolving the issue, Defendants shall, within one (1) week of the on-site inspection, apply to the Court for resolution of the issue by filing a statement setting forth the basis for DEA's position.

25. The Drug Enforcement Administration will expedite Plaintiffs' applications for registration to import and distribute *hoasca* and Plaintiffs' application for an import permit. The DEA shall issue Plaintiffs a registration to import hoasca, a registration to distribute hoasca, and an import permit within thirty (30) days of receipt of Plaintiffs' applications for such items, or will show cause before this Court why such items have not yet been issued. Immediately upon registration, the UDV may resume its religious services using the *hoasca* presently in its possession, subject to compliance with the conduct set forth in this order. The provisions of 21 C.F.R. § 1301.13(a) notwith-

standing, Plaintiffs are entitled to import and distribute hoasca immediately upon issuance of the applicable registrations, even if the Certificate of Registration has not yet been issued.

26. Plaintiffs shall keep records relating to their dispensation of hoasca as set forth at 21 C.F.R. § 1304.24(a), with the following qualifications: subsection (a)(2) shall not apply, and Plaintiffs shall instead be required to list the appropriate batch number (as discussed above in paragraphs 17-18); subsection (a)(5) shall not apply, and Plaintiffs shall instead be required to indicate the number of bona fide participants in the religious ceremony/event who received hoasca; under subsection (a)(6), Plaintiffs shall specify the total amount of hoasca consumed during the ceremony/event.

27. If Defendants confiscate any shipment of *hoasca* under 21 C.F.R. § 1312.15(a) because the amount imported exceeds the amount specified on the import permit, they shall preserve all of the confiscated *hoasca* and return it to Plaintiffs promptly upon a satisfactory, non-diversion explanation by Plaintiffs as to the additional amount. If any of the confiscated *hoasca* is delivered to any other departments, bureaus, or agencies of the United States or any State pursuant to 21 C.F.R. § 1307.22, said departments, bureaus, or agencies will similarly preserve the *hoasca* pending Plaintiffs' explanation.

28. Plaintiffs will comply with the requirements of 21 C.F.R. Part 1305, except that Plaintiffs shall complete the relevant order forms as follows: The Central Office of the UDV will fill out the order

forms when sending any *hoasca* to any UDV congregation. At the time the *hoasca* is sent to the congregation, the UDV will mail one copy of the form to the site receiving the *hoasca* and one copy to the DEA, and will retain its own copy. The site receiving the *hoasca* will annotate the form to specify the volume of *hoasca* received. If the volume received differs from the volume shipped (as indicated on the form), Plaintiffs shall notify DEA immediately of the discrepancy.

29. The provisions of 21 C.F.R. §§ 1301.36 and 1312.16(a) notwithstanding, Defendants are enjoined from suspending or revoking Plaintiffs' registration to import and /or distribute *hoasca* and/or Plaintiffs' import permit on any grounds other than the following: (a) material falsification of an application; (b) conviction of the registrant of a felony relating to a controlled substance; of (c) evidence of diversion of *hoasca* for which Plaintiffs are responsible. If Defendants believe that evidence exists that *hoasca* has negatively affected the health of UDV members, Defendants may apply to the Court for an expedited determination of whether such evidence warrants suspension or revocation of Plaintiffs' registration. If Defendants believe that a shipment of *hoasca* contain particularly dangerous levels of DMT, Defendants may apply to the Court for an expedite determination of whether the evidence warrants suspension or revocation of Plaintiffs' registration. If the United States, subsequent to the date of this Order, enters into a treaty or other international agreement that Defendants believe clearly prohibits the importation and/or distribution of *hoasca*,

Defendants may apply to the Court for an expedited determination of whether the treaty or international agreement warrants suspension or revocation of Plaintiffs' registration.

30. The Defendants, their agencies, agents, employees, and persons under their control, are enjoined from applying or enforcing any of the laws, regulations, and treaties that govern the legal importation and distribution of Schedule I substances for the purpose of prohibiting, preventing, unduly delaying, or otherwise interfering with Plaintiffs' religious use of hoasca in a manner that is inconsistent with this Court's August 12, 2002, Memorandum and Opinion.

31. To enable Defendants to distinguish between authorized and unauthorized uses of *hoasca*, Plaintiffs will provide Defendants with general information about the times and locations of their ceremonies immediately upon entrance of this Order. Plaintiffs will notify Defendants in writing in advance of any significant changes to this information.

32. Plaintiffs shall maintain a thorough, accurate, updated list of prescription drugs, subject to reasonable inspection and approval by Defendants on a periodic basis, that may adversely interact with MAO inhibitors. Plaintiffs shall provide this list to all current and prospective members, shall inform them of the possibility of adverse interactions between these drugs and *hoasca*, and shall encourage them to notify a health care professional if they believe they may have experienced such an adverse interaction. These communications shall take place prior to any ingestion of

*hoasca*, and shall be accomplished in one or both of the following ways: (a) direct mailing to the individual member/potential member; (b) hand delivery to the individual member/potential member.

33. Plaintiffs shall inform all current and prospective members in writing that if they have a history of psychosis or psychotic episodes they may be particularly susceptible to an adverse reaction in using *hoasca*, and shall encourage such persons to seek the advice of a health care professional if they fall within this category. These communications shall take place prior to any ingestion of *hoasca*, and shall be accomplished in one or both of the following ways: (a) direct mailing to the individual member/potential member; (b) hand delivery to the individual member/potential member.

34. Defendants, their agencies, agents, and employees may not be held legally or otherwise responsible for any injury or other adverse effect incurred by any person or property as a direct in indirect result of Plaintiffs' importation, possession, distribution, and use of *hoasca*.

35. Plaintiffs will designate one person to coordinate importation, storage, and distribution of the hoasca, and to serve as a liaison with DEA. DEA will designate one person, or a small number of persons, to serve as a liaison with Plaintiffs.

36. Nothing in this Order precludes any party from applying to the Court for any relief available under the Federal Rules of Civil Procedure.

Date: _____ /s/ JAMES A. PARKER
JAMES A. PARKER
Chief United States District Judge

**APPENDIX G**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

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No. CV 00-1647 JP/RLP

O CENTRO ESPIRITA BENEFICIENTE
UNIAO DO VEGETAL, ET AL., PLAINTIFFS

*v.*

JOHN ASHCROFT, ET AL., DEFENDANTS

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**DECLARATION OF GARY T. SHERIDAN**

1. My name is Gary T. Sheridan. I have been employed as a Special Agent by the Drug Enforcement Administration (DEA) since September of 1983. I have served as a supervisory Special Agent since 1991. I am currently the Chief of Operations for South America, Office of International Operations, DEA Headquarters, Arlington, Virginia. I have served at DEA's domestic divisions in Detroit and Miami, and I served for more than six years in DEA's offices in Bogota and Barranquilla, Colombia. I have also served in the Office of Inspections in DEA Headquarters. My training as a special agent has involved completing several courses, including the Basic Agents' Course and the Clandestine Laboratories Investigations course.

2. My current responsibilities include operational oversight of the DEA offices in South America. I have daily contact with DEA's offices in South America and I assist them in planning operations and investigations. I

also serve as the liaison between DEA's offices in South America and the chain of command at DEA Headquarters. Additionally, I am responsible for ensuring that DEA's office in South America have the resources necessary to accomplish their missions.

3. The facts and opinions in this declaration are based on my knowledge, training, and experience as Special Agent, and on the law enforcement information obtained from personnel within DEA.

4. The international treaties relating to control of narcotics and psychotropic substances play a significant role in preventing international trafficking in controlled substances. The United States, through the international efforts of DEA, relies on the adherence to these treaties by other countries in supporting international cooperative efforts to prevent the illegal exportation, importation, and distribution of substances that are controlled under these treaties.

5. I have personal knowledge of situations in which the DEA has cited to the obligations that a signatory nation has under the international drug and extradition treaties to support a request for assistance in drug enforcement operations. Unlike the United States, many countries do not have comprehensive domestic drug laws. The international treaties on narcotic drugs and psychotropic substances provide DEA with the authority under international law to seek and receive assistance from other countries that have signed these treaties.

6. The comprehensive statutory and regulatory controls found in U.S. domestic law are not present in many countries. Therefore, controlled substances that are cultivated, manufactured, or prepared in foreign

countries are often introduced illicitly into the United States. Much of the illicit cocaine seized in the United States, for example, is cultivated and manufactured in foreign countries and then illegally smuggle into the United States.

7. I have been informed by personnel in DEA's Brasilia Country Office that Brazil does not control ayahuasca under its domestic law. It is apparent from this case and other cases in which U.S. law enforcement agencies have seized ayahuasca that the tea is being exported from Brazil without restriction. It is my opinion that the potential for the tea to be possessed, distributed, and used for nonreligious purposes in Brazil is significant because of this lack of control. The lack of control over ayahuasca in Brazil increases the risk that the tea is and will continue to be available in Brazil and other South American countries to individuals who may use it for nonreligious purposes. Consequently, the potential for illegal importation of ayahuasca into the United States is increased.

8. I am aware that controlled substances with legitimate scientific and medical uses are often diverted into illicit channels and abused. I am also aware of Schedule I hallucinogenic controlled substances with no approved medical or scientific use are sought by a large number of persons in the United States for recreational use. Given the desire of many individuals to use and abuse hallucinogenic substances, it is my opinion that if *any* group were allowed to import a Schedule I hallucinogenic substance, the potential for diversion and use and abuse of that substance would be greater than if the substance were never imported.

9. I am familiar with the claim of the Plaintiffs of reported side effects, such as nausea, vomiting, and di-

arrhea, of ayahuasca on those who consume it. I am also aware that users of other controlled substances endure many side effects and great pain and discomfort when using and abusing other controlled substances. For example, heroin users have endured the pain of inserting a syringe under their eyelids, as well as in other sensitive body parts, in order to inject the heroin into their bodies. Users of heroin and other controlled substances often suffer nausea and other ill effects and yet the use and abuse of heroin and other controlled substances persists. Based upon my experience in law enforcement and my training, I do not believe that the side of effects of ayahuasca would be a significant deterrent to individuals who may desire to consume and abuse ayahuasca for its hallucinogenic effect.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on this 24th day of January, 2001 at Arlington, VA.

/s/ GARY T. SHERIDAN
GARY T. SHERIDAN, Chief of
Operations for South America,
Office on International
Operations, DEA

**APPENDIX H**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

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No. CV 00-1647 JP/RLP

O CENTRO ESPIRITA BENEFICIENTE
UNIAO DO VEGETAL, ET AL., PLAINTIFFS

*v.*

JOHN ASHCROFT, ET AL., DEFENDANTS

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**DECLARATION OF ROBERT E. DALTON**

I, Robert E. Dalton, do hereby state as follows:

1. I am now, and have been since August 1990, the Assistant Legal Adviser for Treaty Affairs of the United States Department of State, Washington, D.C. The Treaty Affairs Office oversees the negotiation and signature, Congressional reporting, publication, and maintenance of records concerning United States treaties and other international agreements. In this regard, it keeps and preserves records of treaties and other international agreements concluded by the United States of America, in accordance with regulations found in 11 Foreign Affairs Manual Part 750 and 22 C.F.R. Part 181.

2. My responsibilities as head of the Department's Treaty Affairs Office require that I be familiar with the practice of the United States in matters concerning the making, interpretation, and application of treaties and other international agreements. My responsibilities

also include maintaining the official treaty records of the United States and supervising the publication of the annual volume entitled *Treaties in Force*, which is an official publication of the Department of State that lists treaties and other international agreements in force between the United States and other countries as of the date of publication. I make the following statements based on upon my personal knowledge and upon information made available to me in the performance of my official duties.

3. The United Nations Convention on Psychotropic Substances ("the Convention") was done at Vienna on February 21, 1971, and entered into forced internationally on August 16, 1976. The U.S. Senate gave advice and consent to ratification, subject to a reservation, on March 20, 1980, and the President of the United States ratified the Convention, subject to a reservation, on April 7, 1980. The United States deposited its instrument of ratification witht the Secretary General of the United Nations on April 16, 1980. The Convention entered into force for the United States on July 15, 1980, the ninetieth day following the deposit of the instrument of ratification, pursuant to the provisions of Article 26 thereof.

4. This Convention was the first international instrument adopted for the purpose of combating the abuse of psychotropic substances and the illicit traffic to which it gives rise. The preamble to the Convention notes that "rigorous measures are necessary to restrict the use of such substances to legitimate purposes." For this purpose, the Convention provides four schedules, and each schedule lists a number of different substances that are subject to controls. The schedules differ depending on the extent of the abuse, or potential for

abuse, of the substances listed in each, and the therapeutic usefulness of such substances. The Convention then provides gradations of controls for the substances on each schedule.

5. The most rigorous measures of control are for substances in Schedule I (including dimethyltryptamine or "DMT"). For substances in Schedule I, Article 7 of the Convention (1) prohibits the use of such substances except for scientific and very limited medical purposes by duly authorized persons; (2) requires that manufacture, trade, distribution and possession of such substances be under a special license or prior authorization; (3) provides for close supervision of such activities; and (4) prohibits the export and import of such substances without both an export and an import authorization.

6. Article 3, paragraph (1) of the Convention provides, with exceptions not relevant here, that "a preparation is subject to the same measures of control as the psychotropic substance which it contains . . ." Article 1, paragraph (f) of the Convention defines the term "preparation" as:

> (i) any solution or mixture, in whatever physical state, containing one or more psychotropic substances, or
>
> (ii) One or more psychotropic substances in dosage form.

7. Article 32, paragraph 4 of the Convention permits a State to make a reservation, at the time of signature, ratification or accession, as follows:

> A State on whose territory there are plants growing wild which contain psychotropic substances from

> among those in Schedule I and which are traditionally used by certain small, clearly determined groups in magical or religious rites, may, at the time of signature, ratification or accession make reservations concerning these plants, in respect of the provisions of article 7, except for the provisions relating to international trade.

8. Pursuant to Article 32, and as recommended by the Secretary of State, the U.S. instrument of ratification for this Convention, deposited with the Secretary General of the United Nations on April 16, 1980, contains the following reservation (or statement) modifying the legal effect of Article 7 of the Convention for the United States:

> In accord with paragraph 4 of article 32 of the Convention, peyote harvested and distributed for use by the Native American Church in its religious rites is excepted from the provisions of article 7 of the Convention on Psychotropic Substances.

9. This was the only reservation made by the United States when it became a Party to this Convention. Under the terms of the Convention, the United States cannot submit another reservation at this time, or amend the existing reservation to cover other plants or other users. Moreover, pursuant to the terms of Article 32, paragraph 4, the existing reservation does not alter the requirements relating to international trade (including import and export) with respect to substances on Schedule I.

10. The United States has a fundamental interest in the observance of its international treaty obligations. The foundation upon which treaty law is based is the long-established principle of *pacta sunt servanda*

(agreements must be observed). This principle is expressed in Article 26 of the Vienna Convention on the Law of Treaties, signed for the United States on April 24, 1970, an article which the United States considers as reflecting customary international law on this point. Article 26 provides: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." Thus, the United States has a duty under international law to perform its treaty obligations in good faith. Moreover, as a practical matter, its ability to insist on performance by other countries of their treaty obligations to the United States rests in large measure on the extent to which the United States itself has complied with this principle.

11. In view of the foregoing, I conclude that the Convention on Psychotropic Substances imposes an obligation on the United States to prohibit the use, manufacture, import or export of any controlled substance listed on Schedule I, such as DMT, and any preparation containing such a controlled substance, such as the *ayahuasca* tea transported from Brazil, except in the limited circumstance provided for in the Convention. If the United States were to permit the use, manufacture, import or export of *ayahuasca* tea for religious purposes, then the United States would be in breach of its treaty obligations.

12. The Convention on Psychotropic Substances has been in force internationally for almost 25 years without amendment. It is one of three key United Nations conventions that form the foundation for international cooperation in combating illicit drug trafficking, the others being the 1961 Single Convention on Narcotic Drugs, with its Protocol, and the 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotro-

pic Substances. Based on my experience in treaty affairs, an attempt by one Party to amend such a widely-accepted multilateral convention—particularly an amendment that would loosen the strict controls on international trade in a controlled substance—would entail enormous diplomatic and political costs for any country seeking such an amendment. Such an effort could easily take more than ten years, since an objection by even one of the 167 countries that are parties to the Convention could result in the calling of a diplomatic conference to consider such an amendment, and eventually require ratification by two-thirds of the parties. Even if such an effort were ultimately successful, it could prompt other countries to seek amendments to this or other counter-narcotics conventions, further relaxing international controls on drug traffic. The United States could be placed in an awkward position diplomatically if it were to oppose amendments proposed by other countries, after proposing an amendment itself. Treaty partners might also become more reluctant to enter into future multilateral or bilateral agreements on this subject with the United States.

13. For over 90 years, the United States has been a leader in the development and strengthening of international instruments to combat the illicit traffic in narcotic drugs. From the establishment of the International Opium Commission in Shanghai in 1909, pursuant to a U.S. proposal, and The Hague Convention for the Suppression of the Abuse of Opium and Other Drugs in 1912, through the three United Nations conventions noted above, and continuing today, the United States has taken an active leadership role in developing closer international cooperation and stronger controls over the illicit traffic in drugs. The United States also

engages in active diplomatic efforts to promote compliance with the provisions of the United Nations drug conventions, including the 1971 Convention on Psychotropic Substances. To continue in its strong position of international leadership on this issue, the United States must continue to observe faithfully its treaty obligations under these international instruments.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on this 24th day of January, 2001 at Washington, D.C.

/s/ ROBERT E. DALTON
ROBERT E. DALTON
Assistant Legal Adviser
for Treaty Affairs

## APPENDIX I

## 1971 UNITED NATIONS CONVENTION ON PSYCHOTROPIC SUBSTANCES

***Convention done at Vienna February 21, 1971, as rectified by the procès-verbal of August 15, 1973;***
***Ratification advised by the Senate of the United States of America a reservation, March 20, 1980;***
***Ratified by the President of the United States of America, subject to reservation, April 7, 1980;***
***Ratification of the United States of America deposited with the Secretary-General of the United States of America April 16, 1980;***
***Proclaimed by the President of the United States of America May 12, 1980;***
***Entered into force with respect to the United States of America July 15, 1980***

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BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

### A PROCLAMATION

CONSIDERING THAT:

The Convention on Psychotropic Substances was signed on behalf of the United States of America at Vienna on February 21, 1971, the text of which is hereto annexed;

The Senate of the United States of America by its resolution of March 20, 1980, two-thirds of the Senators present concurring therein, gave its advice and consent

to ratification of the Convention, subject to a reservation as follows:

> That in accord with paragraph 4 of Article 32 of the Convention, peyote harvested and distributed for use by the Native American Church in its religious rites is excepted from the provisions of Article 7 of the Convention of Psychotropic Substances.

The President of the United States of America on April 7, 1980, ratified the Convention, subject to the said reservation, in pursuance of the advice and consent of the Senate, and the United States of America deposited its instrument of ratification with the Secretary-General of the United Nations on April 16, 1980;

Pursuant to the provisions of the Convention, the Convention, subject to the said reservation, enters into force for the United States of America on July 15, 1980.

NOW, THEREFORE, I, Jimmy Carter, President of the United States of America, proclaim and make public the Convention, subject to the said reservation, to the end that it shall be observed and fulfilled with good faith on and after July 15, 1980, by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof.

IN TESTIMONY WHEREOF. I have signed this proclamation and caused the Seal of the United States of America to be affixed.

DONE at the city of Washington this twelfth day of May in the year of our Lord one thousand nine hundred eighty and of the Independence of the United States of America the two hundred fourth.

[SEAL]

By the President: JIMMY CARTER

EDMUND S. MUSKIE
*Secretary of State*

# CONVENTION ON PSYCHOTROPIC SUBSTANCES

## PREAMBLE

The Parties,

Being concerned with the health and welfare of mankind,

Noting with concern the public health and social problems resulting from the abuse of certain psychotropic substances,

Determined to prevent and combat abuse of such substances and the illicit traffic to which it gives rise,

Considering that rigorous measures are necessary to restrict the use of such substances to legitimate purposes,

Recognizing that the use of psychotropic substances for medical and scientific purposes is indispensable and that their availability for such purposes should not be unduly restricted,

Believing that effective measures against abuse of such substances require co-ordination and universal action,

Acknowledging the competence of the United Nations in the field of control of psychotropic substances and desirous that the international organs concerned should be within the framework of that Organization,

Recognizing that an international convention is necessary to achieve these purposes,

Agree as follows:

ARTICLE 1

Use of terms

Except where otherwise expressly indicated, or where the context otherwise requires, the following terms in this Convention have the meanings given below:

(a) "Council" means the Economic and Social Council of the United Nations.

(b) "Commission" means the Commission on Narcotic Drugs of the Council.

(c) "Board" means the International Narcotics Control Board provided for in the Single Convention on Narcotic Drugs, 1961.[1]

(d) "Secretary-General" means the Secretary-General of the United Nations.

(e) "Psychotropic substance" means any substance, natural or synthetic, or any natural material in Schedule I, II, III or IV.

(f) "Preparation" means:

(i) any solution or mixture, in whatever physical state, containing one or more psychotropic substances, or

(ii) one or more psychotropic substances in dosage form.

(g) "Schedule I", "Schedule II", "Schedule III" and "Schedule IV" mean the correspondingly numbered lists of psychotropic substances

[1] TIAS 6298, 6423, 6458, 6795, 7223, 7817, 7945, 8118; 18 UST 1407, 3279; 19 UST 4668; 20 UST 4064; 22 UST 1808; 25 UST 651, 2772; 26 UST 1439. [Footnote added by the Department of State.]

annexed to this Convention, as altered in accordance with article 2.

(h) "Export" and "import" mean in their respective connotations the physical transfer of a psychotropic substance from one State to another State.

(i) "Manufacture" means all processes by which psychotropic substances may be obtained, and includes refining as well as the transformation of psychotropic substances into other psychotropic substances. The term also includes the making of preparations other than those made on prescription in pharmacies.

(j) "Illicit traffic" means manufacture of or trafficking in psychotropic substances contrary to the provisions of this Convention.

(k) "Region" means any part of a State which pursuant to article 28 is treated as a separate entity for the purposes of this Convention.

(l) "Premises" means buildings or parts of buildings, including the appertaining land.

ARTICLE 2

Scope of control of substances

1. If a Party or the World Health Organization has information relating to a substance not yet under international control which in its opinion may require the addition of that substance to any of the Schedules of this Convention, it shall notify the Secretary-General and furnish him with the information in support of that notification. The foregoing procedure shall also apply when a Party or the World Health Organization has

information justifying the transfer of a substance from one Schedule to another among those Schedules, or the deletion of a substance from the Schedules.

2. The Secretary-General shall transmit such notification, and any information which he considers relevant, to the Parties, to the Commission and, when the notification is made by a Party, to the World Health Organization.

3. If the information transmitted with such a notification indicates that the substance is suitable for inclusion in Schedule I or Schedule II pursuant to paragraph 4, the Parties shall examine, in the light of all information available to them, the possibility of the provisional application to the substance of all measures of control applicable to substances in Schedule I or Schedule II, as appropriate.

4. If the World Health Organization finds:

(a) that the substance has the capacity to produce

(i) (1) a state of dependence, and

(2) central nervous system stimulation or depression, resulting in hallucinations or disturbances in motor function or thinking or behavior or perception or mood, or

(ii) similar abuse and similar ill effects as a substance in Schedule I, II, III or IV, and

(b) that there is sufficient evidence that the substance is being or is likely to be abused so as to constitute a public health and social problem warranting the placing of the substance under international control,

the World Health Organization shall communicate to the Commission an assessment of the substance, including the extent or likelihood of abuse, the degree of seriousness of the public health and social problem and the degree of usefulness of the substance in medical therapy, together with recommendations on control measures, if any, that would be appropriate in the light of its assessment.

5. The Commission, taking into account the communication from the World Health Organization, whose assessments shall be determinative as to medical and scientific matters, and bearing in mind the economic, social, legal, administrative and other factors it may consider relevant, may add the substance to Schedule I, II, III or IV. The Commission may seek further information from the World Health Organization or from other appropriate sources.

6. If a notification under paragraph 1 relates to a substance already listed in one of the Schedules, the World Health Organization shall communicate to the Commission its new findings, any new assessment of the substance it may make in accordance with paragraph 4 and any new recommendations on control measures it may find appropriate in the light of that assessment. The Commission, taking into account the communication from the World Health Organization as under paragraph 5 and bearing in mind the factors referred to in that paragraph, may decide to transfer the substance from one Schedule to another or to delete it from the Schedules.

7. Any decision of the Commission taken pursuant to this article shall be communicated by the Secretary-General to all States Members of the United Nations, to non-member States Parties to this Convention, to the

World Health Organization and to the Board. Such decision shall become fully effective with respect to each Party 180 days after the date of such communication, except for any Party which, within that period, in respect of a decision adding a substance to a Schedule, has transmitted to the Secretary-General a written notice that, in view of exceptional circumstances, it is not in a position to give effect with respect to that substance to all of the provisions of the Convention applicable to substances in that Schedule. Such notice shall state the reasons for this exceptional action. Notwithstanding its notice, each Party shall apply, as a minimum, the control measures listed below:

(a) A Party having given such notice with respect to a previously uncontrolled substance added to Schedule I shall take into account, as far as possible, the special control measures enumerated in article 7 and, with respect to that substance, shall:

(i) require licences for manufacture, trade and distribution as provided in article 8 for substances in Schedule II;

(ii) require medical prescriptions for supply or dispensing as provided in article 9 for substances in Schedule II;

(iii) comply with the obligations relating to export and import provided in article 12, except in respect to another Party having given such notice for the substance in question;

(iv) comply with the obligations provided in article 13 for substances in Schedule II in

regard to prohibition of and restrictions on export and import;

(v) furnish statistical reports to the Board in accordance with paragraph 4 (a) of article 16; and

(vi) adopt measures in accordance with article 22 for the repression of acts contrary to laws or regulations adopted pursuant to the foregoing obligations.

(b) A Party having given such notice with regard to a previously uncontrolled substance added to Schedule II shall, with respect to that substance:

(i) require licences for manufacture, trade and distribution in accordance with article 8;

(ii) require medical prescriptions for supply or dispensing in accordance with article 9;

(iii) comply with the obligations relating to export and import provided in article 12, except in respect to another Party having given such notice for the substance in question;

(iv) comply with the obligations of article 13 in regard to prohibition of and restrictions on export and import;

(v) furnish statistical reports to the Board in accordance with paragraphs 4 (a), (c) and (d) of article 16; and

(vi) adopt measures in accordance with article 22 for the repression of acts contrary to

laws or regulations adopted pursuant to the foregoing obligations.

(c) A Party having given such notice with regard to a previously uncontrolled substance added to Schedule III shall, with respect to that substance:

(i) require licences for manufacture, trade and distribution in accordance with article 8;

(ii) require medical prescriptions for supply or dispensing in accordance with article 9;

(iii) comply with the obligations relating to export provided in article 12, except in respect to another Party having given such notice for the substance in question;

(iv) comply with the obligations of article 13 in regard to prohibition of and restrictions on export and import; and

(v) adopt measures in accordance with article 22 for the repression of acts contrary to laws or regulations adopted pursuant to the foregoing obligations.

(d) A Party having given such notice with regard to a previously uncontrolled substance added to Schedule IV shall, with respect to that substance:

(i) require licences for manufacture, trade and distribution in accordance with article 8;

(ii) comply with the obligations of article 13 in regard to prohibition of and restrictions on export and import; and

(iii) adopt measures in accordance with article 22 for the repression of acts contrary to laws or regulations adopted pursuant to the foregoing obligations.

(e) A Party having given such notice with regard to a substance transferred to a Schedule providing stricter controls and obligations shall apply as a minimum all of the provisions of this Convention applicable to the Schedule from which it was transferred.

8. (a) The decisions of the Commission taken under this article shall be subject to review by the Council upon the request of any Party filed within 180 days from receipt of notification of the decision. The request for review shall be sent to the Secretary-General together with all relevant information upon which the request for review is based.

(b) The Secretary-General shall transmit copies of the request for review and the relevant information to the Commission, to the World Health Organization and to all the Parties, inviting them to submit comments within ninety days. All comments received shall be submitted to the Council for consideration.

(c) The Council may confirm, alter or reverse the decision of the Commission. Notification of the Council's decision shall be transmitted to all States Members of the United Nations, to non-member States Parties to this Convention, to the Commission, to the World Health Organization and to the Board.

(d) During pendency of the review, the original decision of the Commission shall, subject to paragraph 7, remain in effect.

9. The Parties shall use their best endeavours to apply to substances which do not fall under this Convention, but which may be used in the illicit manufacture of psychotropic substances, such measures of supervision as may be practicable.

ARTICLE 3

Special provisions regarding the control of preparations

1. Except as provided in the following paragraphs of this article, a preparation is subject to the same measures of control as the psychotropic substance which it contains, and, if it contains more than one such substance, to the measures applicable to the most strictly controlled of those substances.

2. If a preparation containing a psychotropic substance other than a substance in Schedule I is compounded in such a way that it presents no, or a negligible, risk of abuse and the substance cannot be recovered by readily applicable means in a quantity liable to abuse, so that the preparation does not give rise to a public health and social problem, the preparation may be exempted from certain of the measures of control provided in this Convention in accordance with paragraph 3.

3. If a Party makes a finding under the preceding paragraph regarding a preparation, it may decide to exempt the preparation, in its country or in one of its regions, from any or all of the measures of control provided in this Convention except the requirements of:

(a) article 8 (licences), as it applies to manufacture;

(b) article 11 (records), as it applies to exempt preparations;

(c) article 13 (prohibition of and restrictions on export and import);

(d) article 15 (inspection), as it applies to manufacture;

(e) article 16 (reports to be furnished by the Parties), as it applies to exempt preparations; and

(f) article 22 (penal provisions), to the extent necessary for the repression of acts contrary to laws or regulations adopted pursuant to the foregoing obligations.

A Party shall notify the Secretary-General of any such decision, of the name and composition of the exempt preparation, and of the measures of control from which it is exempted. The Secretary-General shall transmit the notification to the other Parties, to the World Health Organization and to the Board.

4. If a Party or the World Health Organization has information regarding a preparation exempted pursuant to paragraph 3 which in its opinion may require the termination, in whole or in part, of the exemption, it shall notify the Secretary-General and furnish him with the information in support of the notification. The Secretary-General shall transmit such notification, and any information which he considers relevant, to the Parties, to the Commission and, when the notification is made by a Party, to the World Health Organization. The World Health Organization shall communicate to

the Commission an assessment of the preparation in relation to the matters specified in paragraph 2, together with a recommendation of the control measures, if any, from which the preparation should cease to be exempted. The Commission, taking into account the communication from the World Health Organization, whose assessment shall be determinative as to medical and scientific matters, and bearing in mind the economic, social, legal, administrative and other factors it may consider relevant, may decide to terminate the exemption of the preparation from any or all control measures. Any decision of the Commission taken pursuant to this paragraph shall be communicated by the Secretary-General to all States Members of the United Nations, to non-member States Parties to this Convention, to the World Health Organization and to the Board. All Parties shall take measures to terminate the exemption from the control measure or measures in question within 180 days of the date of the Secretary-General's communication.

ARTICLE 4

Other special provisions regarding the scope of control

In respect of psychotropic substances other than those in Schedule I, the Parties may permit:

(a) the carrying by international travelers of small quantities of preparations for personal use; each Party shall be entitled, however, to satisfy itself that these preparations have been lawfully obtained;

(b) the use of such substances in industry for the manufacture of non-psychotropic substances or products, subject to the application of the

measures of control required by this Convention until the psychotropic substances come to be in such a condition that they will not in practice be abused or recovered;

(c) the use of such substances, subject to the application of the measures of control required by this Convention, for the capture of animals by persons specifically authorized by the competent authorities to use such substances for that purpose.

ARTICLE 5

Limitation of use to medical and scientific purposes

1. Each Party shall limit the use of substances in Schedule I as provided in article 7.

2. Each Party shall, except as provided in article 4, limit by such measures as it considers appropriate the manufacture, export, import, distribution and stocks of, trade in, and use and possession of, substances in Schedules II, III and IV to medical and scientific purposes.

3. It is desirable that the Parties do not permit the possession of substances in Schedules II, III and IV except under legal authority.

ARTICLE 6

Special administration

It is desirable that for the purpose of applying the provisions of this Convention, each Party establish and maintain a special administration, which may with advantage be the same as, or work in close co-operation with, the special administration established pursuant to

the provisions of conventions for the control of narcotic drugs.

ARTICLE 7

Special provisions regarding substances in Schedule I

In respect of substances in Schedule I, the Parties shall:

(a) prohibit all use except for scientific and very limited medical purposes by duly authorized persons, in medical or scientific establishments which are directly under the control of their Governments or specifically approved by them;

(b) require that manufacture, trade, distribution and possession be under a special licence or prior authorization;

(c) provide for close supervision of the activities and acts mentioned in paragraphs (a) and (b);

(d) restrict the amount supplied to a duly authorized person to the quantity required for his authorized purpose;

(e) require that persons performing medical or scientific functions keep records concerning the acquisition of the substances and the details of their use, such records to be preserved for at least two years after the last use recorded therein; and

(f) prohibit export and import except when both the exporter and importer are the competent authorities or agencies of the exporting and importing country or region, respectively, or other persons or enterprises which are specifi-

cally authorized by the competent authorities of their country or region for the purpose. The requirements of paragraph 1 of article 12 for export and import authorizations for substances in Schedule II shall also apply to substances in Schedule I.

ARTICLE 8

Licences

1. The Parties shall require that the manufacture of, trade (including export and import trade) in, and distribution of substances listed in Schedules II, III and IV be under licence or other similar control measure.

2. The Parties shall:

(a) control all duly authorized persons and enterprises carrying on or engaged in the manufacture of, trade (including export and import trade) in, or distribution of substances referred to in paragraph 1;

(b) control under licence or other similar control measure the establishments and premises in which such manufacture, trade or distribution may take place; and

(c) provide that security measures be taken with regard to such establishments and premises in order to prevent theft or other diversion of stocks.

3. The provisions of paragraphs 1 and 2 of this article relating to licensing or other similar control measures need not apply to persons duly authorized to perform and while performing therapeutic or scientific functions.

4. The Parties shall require that all persons who obtain licences in accordance with this Convention or who are otherwise authorized pursuant to paragraph 1 of this article or sub-paragraph (b) of article 7 shall be adequately qualified for the effective and faithful execution of the provisions of such laws and regulations as are enacted in pursuance of this Convention.

ARTICLE 9

Prescriptions

1. The Parties shall require that substances in Schedules II, III and IV be supplied or dispensed for use by individuals pursuant to medical prescription only, except when individuals may lawfully obtain, use, dispense or administer such substances in the duly authorized exercise of therapeutic or scientific functions.

2. The Parties shall take measures to ensure that prescriptions for substances in Schedules II, III and IV are issued in accordance with sound medical practice and subject to such regulation, particularly as to the number of times they may be refilled and the duration of their validity, as will protect the public health and welfare.

3. Notwithstanding paragraph 1, a Party may, if in its opinion local circumstances so require and under such conditions, including record-keeping, as it may prescribe, authorize licensed pharmacists or other licensed retail distributors designated by the authorities responsible for public health in its country or part thereof to supply, at their discretion and without prescription, for use for medical purposes by individuals in exceptional cases, small quantities, within limits to be defined by the Parties, of substances in Schedules III and IV.

ARTICLE 10

Warnings on packages, and advertising

1. Each Party shall require, taking into account any relevant regulations or recommendations of the World Health Organization, such directions for use, including cautions and warnings, to be indicated on the labels where practicable and in any case on the accompanying leaflet of retail packages of psychotropic substances, as in its opinion are necessary for the safety of the user.

2. Each Party shall, with due regard to its constitutional provisions, prohibit the advertisement of such substances to the general public.

ARTICLE 11

Records

1. The Parties shall require that, in respect of substances in Schedule I, manufacturers and all other persons authorized under article 7 to trade in and distribute those substances keep records, as may be determined by each Party, showing details of the quantities manufactured, the quantities held in stock, and, for each acquisition and disposal, details of the quantity, date, supplier and recipient.

2. The Parties shall require that, in respect of substances in Schedules II and III, manufacturers, wholesale distributors, exporters and importers keep records, as may be determined by each Party, showing details of the quantities manufactured and, for each acquisition and disposal, details of the quantity, date, supplier and recipient.

3. The Parties shall require that, in respect of substances in Schedule II, retail distributors, institutions

for hospitalization and care and scientific institutions keep records, as may be determined by each Party, showing, for each acquisition and disposal, details of the quantity, date, supplier and recipient.

4. The Parties shall ensure, through appropriate methods and taking into account the professional and trade practices in their countries, that information regarding acquisition and disposal of substances in Schedule III by retail distributors, institutions for hospitalization and care and scientific institutions is readily available.

5. The Parties shall require that, in respect of substances in Schedule IV, manufacturers, exporters and importers keep records, as may be determined by each Party, showing the quantities manufactured, exported and imported.

6. The Parties shall require manufacturers of preparations exempted under paragraph 3 of article 3 to keep records as to the quantity of each psychotropic substance used in the manufacture of an exempt preparation, and as to the nature, total quantity and initial disposal of the exempt preparation manufactured therefrom.

7. The Parties shall ensure that the records and information referred to in this article which are required for purposes of reports under article 16 shall be preserved for at least two years.

ARTICLE 12

Provisions relating to international trade

1. (a) Every Party permitting the export or import of substances in Schedule I or II shall require a separate import or export authorization, on a form to be established by the Commission, to be obtained for each such export or import whether it consists of one or more substances.

(b) Such authorization shall state the international non-proprietary name, or, lacking such a name, the designation of the substance in the Schedule, the quantity to be exported or imported, the pharmaceutical form, the name and address of the exporter and importer, and the period within which the export or import must be effected. If the substance is exported or imported in the form of a preparation, the name of the preparation, if any, shall additionally be furnished. The export authorization shall also state the number and date of the import authorization and the authority by whom it has been issued.

(c) Before issuing an export authorization the Parties shall require an import authorization, issued by the competent authority of the importing country or region and certifying that the importation of the substance or substances referred to therein is approved, and such an authorization shall be produced by the person or establishment applying for the export authorization.

(d) A copy of the export authorization shall accompany each consignment, and the Government issuing the export authorization shall send a copy to the Government of the importing country or region.

(e) The Government of the importing country or region, when the importation has been effected, shall return the export authorization with an endorsement certifying the amount actually imported, to the Government of the exporting country or region.

2. (a) The Parties shall require that for each export of substances in Schedule III exporters shall draw up a declaration in triplicate, on a form to be established by the Commission, containing the following information:

(i) the name and address of the exporter and importer;

(ii) the international non-proprietary name, or, failing such a name, the designation of the substance in the Schedule;

(iii) the quantity and pharmaceutical form in which the substance is exported, and, if in the form of a preparation, the name of the preparation, if any; and

(iv) the date of despatch.

(b) Exporters shall furnish the competent authorities of their country or region with two copies of the declaration. They shall attach the third copy to their consignment.

(c) A Party from whose territory a substance in Schedule III has been exported shall, as soon as possible but not later than ninety days after the date of despatch, send to the competent authorities of the importing country or region, by registered mail with return of receipt requested, one copy of the declaration received from the exporter.

(d) The Parties may require that, on receipt of the consignment, the importer shall transmit the copy

accompanying the consignment, duly endorsed stating the quantities received and the date of receipt, to the competent authorities of his country or region.

3. In respect of substances in Schedules I and II the following additional provisions shall apply:

(a) The Parties shall exercise in free ports and zones the same supervision and control as in other parts of their territory, provided, however, that they may apply more drastic measures.

(b) Exports of consignments to a post office box, or to a bank to the account of a person other than the person named in the export authorization, shall be prohibited.

(c) Exports to bonded warehouses of consignments of substances in Schedule I are prohibited. Exports of consignments of substances in Schedule II to a bonded warehouse are prohibited unless the Government of the importing country certifies on the import authorization, produced by the person or establishment applying for the export authorization, that it has approved the importation for the purpose of being placed in a bonded warehouse. In such case the export authorization shall certify that the consignment is exported for such purpose. Each withdrawal from the bonded warehouse shall require a permit from the authorities having jurisdiction over the warehouse and, in the case of a foreign destination, shall be treated as if it were a new export within the meaning of this Convention.

(d) Consignments entering or leaving the territory of a Party not accompanied by an export authorization shall be detained by the competent authorities.

(e) A Party shall not permit any substances consigned to another country to pass through its territory, whether or not the consignment is removed from the conveyance in which it is carried, unless a copy of the export authorization for consignment is produced to the competent authorities of such Party.

(f) The competent authorities of any country or region through which a consignment of substances is permitted to pass shall take all due measures to prevent the diversion of the consignment to a destination other than that named in the accompanying copy of the export authorization, unless the Government of the country or region through which the consignment is passing authorizes the diversion. The Government of the country or region of transit shall treat any requested diversion as if the diversion were an export from the country or region of transit to the country or region of new destination. If the diversion is authorized, the provisions of paragraph 1 (e) shall also apply between the country or region of transit and the country or region which originally exported the consignment.

(g) No consignment of substances, while in transit or whilst being stored in a bonded warehouse, may be subjected to any process which would change the nature of the substance in question. The packing may not be altered without the permission of the competent authorities.

(h) The provisions of sub-paragraphs (e) to (g) relating to the passage of substances through the territory of a Party do not apply where the consignment in question is transported by aircraft which does not land in the country or region of transit. If the aircraft lands

in any such country or region, those provisions shall be applied so far as circumstances require.

(i) The provisions of this paragraph are without prejudice to the provisions of any international agreements which limit the control which may be exercised by any of the Parties over such substances in transit.

ARTICLE 13

Prohibition of and restrictions on export and import

1. A Party may notify all the other Parties through the Secretary-General that it prohibits the import into its country or into one of its regions of one or more substances in Schedule II, III or IV, specified in its notification. Any such notification shall specify the name of the substance as designated in Schedule II, III or IV.

2. If a Party has been notified of a prohibition pursuant to paragraph 1, it shall take measures to ensure that none of the substances specified in the notification is exported to the country or one of the regions of the notifying Party.

3. Notwithstanding the provisions of the preceding paragraphs, a Party which has given notification pursuant to paragraph 1 may authorize by special import licence in each case the import of specified quantities of the substances in question or preparations containing such substances. The issuing authority of the importing country shall send two copies of the special import licence, indicating the name and address of the importer and the exporter, to the competent authority of the exporting country or region, which may then authorize the exporter to make the shipment. One copy of the special import licence, duly endorsed by the competent

authority of the exporting country or region, shall accompany the shipment.

ARTICLE 14

Special provisions concerning the carriage of psychotropic substances in first-aid kits of ships, aircraft or other forms of public transport engaged in international traffic

1. The international carriage by ships, aircraft or other forms of international public transport, such as international railway trains and motor coaches, of such limited quantities of substances in Schedule II, III or IV as may be needed during their journey or voyage for first-aid purposes or emergency cases shall not be considered to be export, import or passage through a country within the meaning of this Convention.

2. Appropriate safeguards shall be taken by the country of registry to prevent the improper use of the substances referred to in paragraph 1 or their diversion for illicit purposes. The Commission, in consultation with the appropriate international organizations, shall recommend such safeguards.

3. Substances carried by ships, aircraft or other forms of international public transport, such as international railway trains and motor coaches, in accordance with paragraph 1 shall be subject to the laws, regulations, permits and licences of the country of registry, without prejudice to any rights of the competent local authorities to carry out checks, inspections and other control measures on board these conveyances. The administration of such substances in the case of emergency shall not be considered a violation of the requirements of paragraph 1 of article 9.

ARTICLE 15

Inspection

The Parties shall maintain a system of inspection of manufacturers, exporters, importers, and wholesale and retail distributors of psychotropic substances and of medical and scientific institutions which use such substances. They shall provide for inspections, which shall be made as frequently as they consider necessary, of the premises and of stocks and records.

ARTICLE 16

Reports to be furnished by the Parties

1. The Parties shall furnish to the Secretary-General such information as the Commission may request as being necessary for the performance of its functions, and in particular an annual report regarding the working of the Convention in their territories including information on:

(a) important changes in their laws and regulations concerning psychotropic substances; and

(b) significant developments in the abuse of and the illicit traffic in psychotropic substances within their territories.

2. The Parties shall also notify the Secretary-General of the names and addresses of the governmental authorities referred to in sub-paragraph (f) of article 7, in article 12 and in paragraph 3 of article 13. Such information shall be made available to all Parties by the Secretary-General.

3. The Parties shall furnish, as soon as possible after the event, a report to the Secretary-General in respect

of any case of illicit traffic in psychotropic substances or seizure from such illicit traffic which they consider important because of:

(a) new trends disclosed;

(b) the quantities involved;

(c) the light thrown on the sources from which the substances are obtained; or

(d) the methods employed by illicit traffickers.

Copies of the report shall be communicated in accordance with sub-paragraph (b) of article 21.

4. The Parties shall furnish to the Board annual statistical reports in accordance with forms prepared by the Board:

(a) in regard to each substance in Schedules I and II, on quantities manufactured, exported to and imported from each country or region as well as on stocks held by manufacturers;

(b) in regard to each substance in Schedules III and IV, on quantities manufactured, as well as on total quantities exported and imported;

(c) in regard to each substance in Schedules II and III, on quantities used in the manufacture of exempt preparations; and

(d) in regard to each substance other than a substance in Schedule I, on quantities used for industrial purposes in accordance with sub-paragraph (b) of article 4.

The quantities manufactured which are referred to in sub-paragraphs (a) and (b) of this paragraph do not include the quantities of preparations manufactured.

5. A Party shall furnish the Board, on its request, with supplementary statistical information relating to future periods on the quantities of any individual substance in Schedules III and IV exported to and imported from each country or region. That Party may request that the Board treat as confidential both its request for information and the information given under this paragraph.

6. The Parties shall furnish the information referred to in paragraphs 1 and 4 in such a manner and by such dates as the Commission or the Board may request.

ARTICLE 17

Functions of the Commission

1. The Commission may consider all matters pertaining to the aims of this Convention and to the implementation of its provisions, and may make recommendations relating thereto.

2. The decisions of the Commission provided for in articles 2 and 3 shall be taken by a two-thirds majority of the members of the Commission.

ARTICLE 18

Reports of the Board

1. The Board shall prepare annual reports on its work containing an analysis of the statistical information at its disposal, and, in appropriate cases, an account of the explanations, if any, given by or required of Governments, together with any observations and recommendations which the Board desires to make. The Board may make such additional reports as it considers necessary. The reports shall be submitted to the Council

through the Commission, which may make such comments as it sees fit.

2. The reports of the Board shall be communicated to the Parties and subsequently published by the Secretary-General. The Parties shall permit their unrestricted distribution.

ARTICLE 19

Measures by the Board to ensure the execution of the provisions of the Convention

1. (a) If, on the basis of its examination of information submitted by governments to the Board or of information communicated by United Nations organs, the Board has reason to believe that the aims of this Convention are being seriously endangered by reason of the failure of a country or region to carry out the provisions of this Convention, the Board shall have the right to ask for explanations from the Government of the country or region in question. Subject to the right of the Board to call the attention of the Parties, the Council and the Commission to the matter referred to in sub-paragraph (c) below, it shall treat as confidential a request for information or an explanation by a government under this sub-paragraph.

(b) After taking action under sub-paragraph (a), the Board, if satisfied that it is necessary to do so, may call upon the Government concerned to adopt such remedial measures as shall seem under the circumstances to be necessary for the execution of the provisions of this Convention.

(c) If the Board finds that the Government concerned has failed to give satisfactory explanations when called upon to do so under sub-paragraph (a), or has

failed to adopt any remedial measures which it has been called upon to take under sub-paragraph (b), it may call the attention of the Parties, the Council and the Commission to the matter.

2. The Board, when calling the attention of the Parties, the Council and the Commission to a matter in accordance with paragraph 1(c), may, if it is satisfied that such a course is necessary, recommend to the Parties that they stop the export, import, or both, of particular psychotropic substances, from or to the country or region concerned, either for a designated period or until the Board shall be satisfied as to the situation in that country or region. The State concerned may bring the matter before the Council.

3. The Board shall have the right to publish a report on any matter dealt with under the provisions of this article, and communicate it to the Council, which shall forward it to all Parties. If the Board publishes in this report a decision taken under this article or any information relating thereto, it shall also publish therein the views of the Government concerned if the latter so requests.

4. If in any case a decision of the Board which is published under this article is not unanimous, the views of the minority shall be stated.

5. Any State shall be invited to be represented at a meeting of the Board at which a question directly interesting it is considered under this article.

6. Decisions of the Board under this article shall be taken by a two-thirds majority of the whole number of the Board.

7. The provisions of the above paragraphs shall also apply if the Board has reason to believe that the aims of

this Convention are being seriously endangered as a result of a decision taken by a Party under paragraph 7 of article 2.

ARTICLE 20

Measures against the abuse of psychotropic substances

1. The Parties shall take all practicable measures for the prevention of abuse of psychotropic substances and for the early identification, treatment, education, after-care, rehabilitation and social reintegration of the persons involved, and shall co-ordinate their efforts to these ends.

2. The Parties shall as far as possible promote the training of personnel in the treatment, after-care, rehabilitation and social reintegration of abusers of psychotropic substances.

3. The Parties shall assist persons whose work so requires to gain an understanding of the problems of abuse of psychotropic substances and of its prevention, and shall also promote such understanding among the general public if there is a risk that abuse of such substances will become widespread.

ARTICLE 21

Action against the illicit traffic

Having due regard to their constitutional, legal and administrative systems, the Parties shall:

(a) make arrangements at the national level for the co-ordination of preventive and repressive action against the illicit traffic; to this end they may usefully designate an appropriate agency responsible for such co-ordination;

(b) assist each other in the campaign against the illicit traffic in psychotropic substances, and in particular immediately transmit, through the diplomatic channel or the competent authorities designated by the Parties for this purpose, to the other Parties directly concerned, a copy of any report addressed to the Secretary-General under article 16 in connexion with the discovery of a case of illicit traffic or a seizure;

(c) co-operate closely with each other and with the competent international organizations of which they are members with a view to maintaining a co-ordinated campaign against the illicit traffic;

(d) ensure that international co-operation between the appropriate agencies be conducted in an expeditious manner; and

(e) ensure that, where legal papers are transmitted internationally for the purpose of judicial proceedings, the transmittal be effected in an expeditious manner to the bodies designated by the Parties; this requirement shall be without prejudice to the right of a Party to require that legal papers be sent to it through the diplomatic channel.

ARTICLE 22

Penal provisions

1. (a) Subject to its constitutional limitations, each Party shall treat as a punishable offence, when committed intentionally, any action contrary to a law or regulation adopted in pursuance of its obligations under this Convention, and shall ensure that serious offences shall be liable to adequate punishment, particularly by imprisonment or other penalty of deprivation of liberty.

(b) Notwithstanding the preceding sub-paragraph, when abusers of psychotropic substances have committed such offences, the Parties may provide, either as an alternative to conviction or punishment or in addition to punishment, that such abusers undergo measures of treatment, education, after-care, rehabilitation and social reintegration in conformity with paragraph 1 of article 20.

2. Subject to the constitutional limitations of a Party, its legal system and domestic law,

(a) (i) if a series of related actions constituting offences under paragraph 1 has been committed in different countries, each of them shall be treated as a distinct offence;

(ii) intentional participation in, conspiracy to commit and attempts to commit, any of such offences, and preparatory acts and financial operations in connexion with the offences referred to in this article, shall be punishable offences as provided in paragraph 1;

(iii) foreign convictions for such offences shall be taken into account for the purpose of establishing recidivism; and

(iv) serious offences heretofore referred to committed either by nationals or by foreigners shall be prosecuted by the Party in whose territory the offence was committed, or by the Party in whose territory the offender is found if extradition is not acceptable in conformity with the law of the Party to which application is made, and

if such offender has not already been prosecuted and judgement given.

(b) It is desirable that the offences referred to in paragraph 1 and paragraph 2 (a) (ii) be included as extradition crimes in any extradition treaty which has been or may hereafter be concluded between any of the Parties, and, as between any of the Parties which do not make extradition conditional on the existence of a treaty or on reciprocity, be recognized as extradition crimes; provided that extradition shall be granted in conformity with the law of the Party to which application is made, and that the Party shall have the right to refuse to effect the arrest or grant the extradition in cases where the competent authorities consider that the offence is not sufficiently serious.

3. Any psychotropic substance or other substance, as well as any equipment, used in or intended for the commission of any of the offences referred to in paragraphs 1 and 2 shall be liable to seizure and confiscation.

4. The provisions of this article shall be subject to the provisions of the domestic law of the Party concerned on questions of jurisdiction.

5. Nothing contained in this article shall affect the principle that the offences to which it refers shall be defined, prosecuted and punished in conformity with the domestic law of a Party.

ARTICLE 23

Application of stricter control measures than those required by this Convention

A Party may adopt more strict or severe measures of control than those provided by this Convention if, in its opinion, such measures are desirable or necessary for the protection of the public health and welfare.

ARTICLE 24

Expenses of international organs incurred in administering the provisions of the Convention

The expenses of the Commission and the Board in carrying out their respective functions under this Convention shall be borne by the United Nations in such manner as shall be decided by the General Assembly. The Parties which are not Members of the United Nations shall contribute to these expenses such amounts as the General Assembly finds equitable and assesses from time to time after consultation with the Governments of these Parties.

ARTICLE 25

Procedure for admission, signature, ratification and accession

1. Members of the United Nations, States not Members of the United Nations which are members of a specialized agency of the United Nations or of the International Atomic Energy Agency or Parties to the Statute of the International Court of Justice,[1] and any

[1] TS 993; 59 Stat. 1055. [Footnote added by the Department of State.]

other State invited by the Council, may become Parties to this Convention:

(a) by signing it; or

(b) by ratifying it after signing it subject to ratification; or

(c) by acceding to it.

2. The Convention shall be open for signature until 1 January 1972 inclusive. Thereafter it shall be open for accession.

3. Instruments of ratification or accession shall be deposited with the Secretary-General.

ARTICLE 26

Entry into force

1. The Convention shall come into force on the ninetieth day after forty of the States referred to in paragraph 1 of article 25 have signed it without reservation of ratification or have deposited their instruments of ratification or accession.

2. For any other State signing without reservation of ratification, or depositing an instrument of ratification or accession after the last signature or deposit referred to in the preceding paragraph, the Convention shall enter into force on the ninetieth day following the date of its signature or deposit of its instrument of ratification or accession.

ARTICLE 27

Territorial application

The Convention shall apply to all non-metropolitan territories for the international relations of which any Party is responsible except where the previous consent

of such a territory is required by the Constitution of the Party or of the territory concerned, or required by custom. In such a case the Party shall endeavour to secure the needed consent of the territory within the shortest period possible, and when the consent is obtained the Party shall notify the Secretary-General. The Convention shall apply to the territory or territories named in such a notification from the date of its receipt by the Secretary-General. In those cases where the previous consent of the non-metropolitan territory is not required, the Party concerned shall, at the time of signature, ratification or accession, declare the non-metropolitan territory or territories to which this Convention applies.

ARTICLE 28

Regions for the purposes of this Convention

1. Any Party may notify the Secretary-General that, for the purposes of this Convention, its territory is divided into two or more regions, or that two or more of its regions are consolidated into a single region.

2. Two or more Parties may notify the Secretary-General that, as the result of the establishment of a customs union between them, those Parties constitute a region for the purposes of this Convention.

3. Any notification under paragraph 1 or 2 shall take effect on 1 January of the year following the year in which the notification was made.

ARTICLE 29

Denunciation

1. After the expiry of two years from the date of the coming into force of this Convention any Party may, on its own behalf or on behalf of a territory for which it has international responsibility, and which has withdrawn its consent given in accordance with article 27, denounce this Convention by an instrument in writing deposited with the Secretary-General.

2. The denunciation, if received by the Secretary-General on or before the first day of July of any year, shall take effect on the first day of January of the succeeding year, and if received after the first day of July it shall take effect as if it had been received on or before the first day of July in the succeeding year.

3. The Convention shall be terminated if, as a result of denunciations made in accordance with paragraphs 1 and 2, the conditions for its coming into force as laid down in paragraph 1 of article 26 cease to exist.

ARTICLE 30

Amendments

1. Any Party may propose an amendment to this Convention. The text of any such amendment and the reasons therefor shall be communicated to the Secretary-General, who shall communicate them to the Parties and to the Council. The Council may decide either:

(a) that a conference shall be called in accordance with paragraph 4 of Article 62 of the Charter of the

United Nations[1] to consider the proposed amendment; or

(b) that the Parties shall be asked whether they accept the proposed amendment and also asked to submit to the Council any comments on the proposal.

2. If a proposed amendment circulated under paragraph 1 (b) has not been rejected by any Party within eighteen months after it has been circulated, it shall thereupon enter into force. If however a proposed amendment is rejected by any Party, the Council may decide, in the light of comments received from Parties, whether a conference shall be called to consider such amendment.

ARTICLE 31

Disputes

1. If there should arise between two or more Parties a dispute relating to the interpretation or application of this Convention, the said Parties shall consult together with a view to the settlement of the dispute by negotiation, investigation, mediation, conciliation, arbitration, recourse to regional bodies, judicial process or other peaceful means of their own choice.

2. Any such dispute which cannot be settled in the manner prescribed shall be referred, at the request of any one of the parties to the dispute, to the International Court of Justice for decision.

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[1] TS 993; 59 Stat. 1047. [Footnote added by the Department of State.]

ARTICLE 32

Reservations

1. No reservation other than those made in accordance with paragraphs 2, 3 and 4 of the present article shall be permitted.

2. Any State may at the time of signature, ratification or accession make reservations in respect of the following provisions of the present Convention:

(a) article 19, paragraphs 1 and 2;

(b) article 27; and

(c) article 31.

3. A State which desires to become a Party but wishes to be authorized to make reservations other than those made in accordance with paragraphs 2 and 4 may inform the Secretary-General of such intention. Unless by the end of twelve months after the date of the Secretary-General's communication of the reservation concerned, this reservation has been objected to by one third of the States that have signed without reservation of ratification, ratified or acceded to this Convention before the end of that period, it shall be deemed to be permitted, it being understood however that States which have objected to the reservation need not assume towards the reserving State any legal obligation under this Convention which is affected by the reservation.

4. A State on whose territory there are plants growing wild which contain psychotropic substances from among those in Schedule I and which are traditionally used by certain small, clearly determined groups in magical or religious rites, may, at the time of signature, ratification or accession, make reservations concerning these

plants, in respect of the provisions of article 7, except for the provisions relating to international trade.

5. A State which has made reservations may at any time by notification in writing to the Secretary-General withdraw all or part of its reservations.

ARTICLE 33

Notifications

The Secretary-General shall notify to all the States referred to in paragraph 1 of article 25:

(a) signatures, ratifications and accessions in accordance with article 25;

(b) the date upon which this Convention enters into force in accordance with article 26;

(c) denunciations in accordance with article 29; and

(d) declarations and notifications under articles 27, 28, 30 and 32.

IN WITNESS WHEREOF, the undersigned, duly authorized, have signed this Convention on behalf of their respective Governments.

DONE AT VIENNA, this twenty-first day of February one thousand nine hundred and seventy-one, in a single copy in the Chinese, English, French, Russian and Spanish languages, each being equally authentic. The Convention shall be deposited with the Secretary-General of the United Nations, who shall transmit certified true copies thereof to all the Members of the United Nations and to the other States referred to in paragraph 1 of article 25.

## APPENDIX J

1. Section 801 of Title 21 of the U.S.C. provides, in relevant part:

**Congressional findings and declarations: controlled substances**

The Congress makes the following findings and declarations:

* * * * *

**(2)** The illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.

* * * * *

**(7)** The United States is a party to the Single Convention on Narcotic Drugs, 1961, and other international conventions designed to establish effective control over international and domestic traffic in controlled substances.

2. Section 801a of Title 21 of the U.S.C. provides:

**Congressional findings and declarations: psychotropic substances**

The Congress makes the following findings and declarations:

**(1)** The Congress has long recognized the danger involved in the manufacture, distribution, and use of certain psychotropic substances for nonscientific and nonmedical purposes, and has provided strong and effective legislation to control illicit trafficking and to regulate legitimate uses of psychotropic substances in this country. Abuse of psychotropic substances

has beome a phenomenon common to many countries, however, and is not confined to national borders. It is, therefore, essential that the United States cooperate with other nations in establishing effective controls over international traffic in such substances.

**(2)** The United States has joined with other countries in executing an international treaty, entitled the Convention on Psychotropic Substances and signed at Vienna, Austria, on February 21, 1971, which is designed to establish suitable controls over the manufacture, distribution, transfer, and use of certain psychotropic substances. The Convention is not self-executing, and the obligations of the United States thereunder may only be performed pursuant to appropriate legislation. It is the intent of the Congress that the amendments made by this Act, together with existing law, will enable the United States to meet all of its obligations under the Convention and that no further legislation will be necessary for that purpose.

**(3)** In implementing the Convention on Psychotophic Substances, the Congress intends that, consistent with the obligations of the United States under the Convention, control of psychotropic substances in the United States should be accomplished within the framework of the procedures and criteria for classification of substances provided in the Comprehensive Drug Absuse Prevention and Control Act of 1970 [21 U.S.C.A. § 801 et seq.]. This will insure that (A) the availability of psychotropic substances to manufactures, distributors, dispensers and researchers for useful and legitimate medical and scientific purpose will not be unduly restricted; (B) nothing in the Convention will interfere with bona

fide research activities; and (C) nothing in the Convention will interfere with ethical medical practice in this country as determined by the Secretary of Health and Human Services on the basis of a consensus of the view of the American medical and scientific community.

3. Section 802 of Title 21 of the U.S.C. provides, in relevant part:

**Definitions**

**(31)** The term "Convention on Psychotropic Substances" means the Convention on Psychotropic Substances signed at Vienna, Austria, on February 21, 1971; and the term "Single Convention on Narcotic Drugs" means the Single Convention on Narcotic Drugs signed at New York, New York, on March 30, 1961.

* * * * *

**(42)** The term "international transaction" means a transaction involving the shipment of a listed chemical across an international border (other than a United States border) in which a broker or trader located in the United States participates.

* * * * *

4. Section 811 of Title 21 of the U.S.C. provides, in relevant part:

**Authority and criteria for classification of substances**

**(a) Rules and regulations of Attorney General; hearing**

The Attorney General shall apply the provisions of this subchapter to the controlled substances listed in

the schedules established by section 812 of this title and to any other drug or other substance added to such schedules under this subchapter. Except as provided in subsections (d) and (e) of this section, the Attorney General may by rule—

**(1)** add to such a schedule or transfer between such schedules any drug or other substance if he—

**(A)** finds that such drug or other substance has a potential for abuse, and

**(B)** makes with respect to such drug or other substance the findings prescribed by subsection (b) of section 812 of this title for the schedule in which such drug is to be placed; or

**(2)** remove any drug or other substance from the schedules if he finds that the drug or other substance does not meet the requirements for inclusion in any schedule.

Rules of the Attorney General under this subsection shall be made on the record after opportunity for a hearing pursuant to the rulemaking procedures prescribed by subchapter II of chapter 5 of title 5. Proceedings for the issuance, amendment, or repeal of such rules may be initiated by the Attorney General (1) on his own motion, (2) at the request of the Secretary, or (3) on the petition of any interested party.

**(b) Evaluation of drugs and other substances**

The Attorney General shall, before initiating proceedings under subsection (a) of this section to control a drug or other substance or to remove a drug or other substance entirely from the schedules, and after gathering the necessary data, request from the Secretary a scientific and medical evaluation, and his recommen-

dations, as to whether such drug or other substance should be so controlled or removed as a controlled substance. In making such evaluation and recommendations, the Secretary shall consider the factors listed in paragraphs (2), (3), (6), (7), and (8) of subsection (c) of this section and any scientific or medical considerations involved in paragraphs (1), (4), and (5) of such subsection. The recommendations of the Secretary shall include recommendations with respect to the appropriate schedule, if any, under which such drug or other substance should be listed. The evaluation and the recommendations of the Secretary shall be made in writing and submitted to the Attorney General within a reasonable time. The recommendations of the Secretary to the Attorney General shall be binding on the Attorney General as to such scientific and medical matters, and if the Secretary recommends that a drug or other substance not be controlled, the Attorney General shall not control the drug or other substance. If the Attorney General determines that these facts and all other relevant data constitute substantial evidence of potential for abuse such as to warrant control or substantial evidence that the drug or other substance should be removed entirely from the schedules, he shall initiate proceedings for control or removal, as the case may be, under subsection (a) of this section.

**(c) Factors determinative of control or removal from schedules**

In making any finding under subsection (a) of this section or under subsection (b) of section 812 of this title, the Attorney General shall consider the following factors with respect to each drug or other substance proposed to be controlled or removed from the schedules:

**(1)** Its actual or relative potential for abuse.

**(2)** Scientific evidence of its pharmacological effect, if known.

**(3)** The state of current scientific knowledge regarding the drug or other substance.

**(4)** Its history and current pattern of abuse.

**(5)** The scope, duration, and significance of abuse.

**(6)** What, if any, risk there is to the public health.

**(7)** Its psychic or physiological dependence liability.

**(8)** Whether the substance is an immediate precursor of a substance already controlled under this subchapter.

**(d) International treaties, conventions, and protocols requiring control; procedures respecting changes in drug schedules of Convention on Psychotropic Substances**

**(1)** If control is required by United States obligations under international treaties, conventions, or protocols in effect on October 27, 1970, the Attorney General shall issue an order controlling such drug under the schedule he deems most appropriate to carry out such obligations, without regard to the findings required by subsection (a) of this section or section 812(b) of this title and without regard to the procedures prescribed by subsections (a) and (b) of this section.

**(2)(A)** Whenever the Secretary of State receives notification from the Secretary-General of the United Nations that information has been transmitted by or to

the World Health Organization, pursuant to article 2 of the Convention on Psychotropic Substances, which may justify adding a drug or other substance to one of the schedules of the Convention, transferring a drug or substance from one schedule to another, or deleting it from the schedules, the Secretary of State shall immediately transmit the notice to the Secretary of Health and Human Services who shall publish it in the Federal Register and provide opportunity to interested persons to submit to him comments respecting the scientific and medical evaluations which he is to prepare respecting such drug or substance. The Secretary of Health and Human Services shall prepare for transmission through the Secretary of State to the World Health Organization such medical and scientific evaluations as may be appropriate regarding the possible action that could be proposed by the World Health Organization respecting the drug or substance with respect to which a notice was transmitted under this subparagraph.

**(B)** Whenever the Secretary of State receives information that the Commission on Narcotic Drugs of the United Nations proposes to decide whether to add a drug or other substance to one of the schedules of the Convention, transfer a drug or substance from one schedule to another, or delete it from the schedules, the Secretary of State shall transmit timely notice to the Secretary of Health and Human Services of such information who shall publish a summary of such information in the Federal Register and provide opportunity to interested persons to submit to him comments respecting the recommendation which he is to furnish, pursuant to this subparagraph, respecting such proposal. The Secretary of Health and Human Services shall evaluate the proposal and furnish a recommendation to

the Secretary of State which shall be binding on the representative of the United States in discussions and negotiations relating to the proposal.

**(3)** When the United States receives notification of a scheduling decision pursuant to article 2 of the Convention on Psychotropic Substances that a drug or other substance has been added or transferred to a schedule specified in the notification or receives notification (referred to in this subsection as a "schedule notice") that existing legal controls applicable under this subchapter to a drug or substance and the controls required by the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 301 et seq.] do not meet the requirements of the schedule of the Convention in which such drug or substance has been placed, the Secretary of Health and Human Services after consultation with the Attorney General, shall first determine whether existing legal controls under this subchapter applicable to the drug or substance and the controls required by the Federal Food, Drug, and Cosmetic Act, meet the requirements of the schedule specified in the notification or schedule notice and shall take the following action:

**(A)** If such requirements are met by such existing controls but the Secretary of Health and Human Services nonetheless believes that more stringent controls should be applied to the drug or substance, the Secretary shall recommend to the Attorney General that he initiate proceedings for scheduling the drug or substance, pursuant to subsections (a) and (b) of this section, to apply to such controls.

**(B)** If such requirements are not met by such existing controls and the Secretary of Health and Human Services concurs in the scheduling decision or schedule notice transmitted by the notification,

the Secretary shall recommend to the Attorney General that he initiate proceedings for scheduling the drug or substance under the appropriate schedule pursuant to subsections (a) and (b) of this section.

**(C)** If such requirements are not met by such existing controls and the Secretary of Health and Human Services does not concur in the scheduling decision or schedule notice transmitted by the notification, the Secretary shall—

**(i)** if he deems that additional controls are necessary to protect the public health and safety, recommend to the Attorney General that he initiate proceedings for scheduling the drug or substance pursuant to subsections (a) and (b) of this section, to apply such additional controls;

**(ii)** request the Secretary of State to transmit a notice of qualified acceptance, within the period specified in the Convention, pursuant to paragraph 7 of article 2 of the Convention, to the Secretary-General of the United Nations;

**(iii)** request the Secretary of State to transmit a notice of qualified acceptance as prescribed in clause (ii) and request the Secretary of State to ask for a review by the Economic and Social Council of the United Nations, in accordance with paragraph 8 of article 2 of the Convention, of the scheduling decision; or

**(iv)** in the case of a schedule notice, request the Secretary of State to take appropriate action under the Convention to initiate proceedings to remove the drug or substance from the schedules under the Convention or to transfer the drug or substance to a schedule under the Convention

different from the one specified in the schedule notice.

**(4)(A)** If the Attorney General determines, after consultation with the Secretary of Health and Human Services, that proceedings initiated under recommendations made under paragraph[1] (B) or (C)(i) of paragraph (3) will not be completed within the time period required by paragraph 7 of article 2 of the Convention, the Attorney General, after consultation with the Secretary and after providing interested persons opportunity to submit comments respecting the requirements of the temporary order to be issued under this sentence, shall issue a temporary order controlling the drug or substance under schedule IV or V, whichever is most appropriate to carry out the minimum United States obligations under paragraph 7 of article 2 of the Convention. As a part of such order, the Attorney General shall, after consultation with the Secretary, except such drug or substance from the application of any provision of part C of this subchapter which he finds is not required to carry out the United States obligations under paragraph 7 of article 2 of the Convention. In the case of proceedings initiated under subparagraph (B) of paragraph (3), the Attorney General, concurrently with the issuance of such order, shall request the Secretary of State to transmit a notice of qualified acceptance to the Secretary-General of the United Nations pursuant to paragraph 7 of article 2 of the Convention. A temporary order issued under this subparagraph controlling a drug or other substance subject to proceedings initiated under subsections (a) and (b) of this section shall expire upon the effective

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[1] So in original. Probably should be "subparagraph".

date of the application to the drug or substance of the controls resulting from such proceedings.

**(B)** After a notice of qualified acceptance of a scheduling decision with respect to a drug or other substance is transmitted to the Secretary-General of the United Nations in accordance with clause (ii) or (iii) of paragraph (3)(C) or after a request has been made under clause (iv) of such paragraph with respect to a drug or substance described in a schedule notice, the Attorney General, after consultation with the Secretary of Health and Human Services and after providing interested persons opportunity to submit comments respecting the requirements of the order to be issued under this sentence, shall issue an order controlling the drug or substance under schedule IV or V, whichever is most appropriate to carry out the minimum United States obligations under paragraph 7 of article 2 of the Convention in the case of a drug or substance for which a notice of qualified acceptance was transmitted or whichever the Attorney General determines is appropriate in the case of a drug or substance described in a schedule notice. As a part of such order, the Attorney General shall, after consultation with the Secretary, except such drug or substance from the application of any provision of part C of this subchapter which he finds is not required to carry out the United States obligations under paragraph 7 of article 2 of the Convention. If, as a result of a review under paragraph 8 of article 2 of the Convention of the scheduling decision with respect to which a notice of qualified acceptance was transmitted in accordance with clause (ii) or (iii) of paragraph (3)(C)—

**(i)** the decision is reversed, and

**(ii)** the drug or substance subject to such decision is not required to be controlled under sched-

ule IV or V to carry out the minimum United States obligations under paragraph 7 of article 2 of the Convention,

the order issued under this subparagraph with respect to such drug or substance shall expire upon receipt by the United States of the review decision. If, as a result of action taken pursuant to action initiated under a request transmitted under clause (iv) of paragraph (3)(C), the drug or substance with respect to which such action was taken is not required to be controlled under schedule IV or V, the order issued under this paragraph with respect to such drug or substance shall expire upon receipt by the United States of a notice of the action taken with respect to such drug or substance under the Convention.

**(C)** An order issued under subparagraph (A) or (B) may be issued without regard to the findings required by subsection (a) of this section or by section 812(b) of this title and without regard to the procedures prescribed by subsection (a) or (b) of this section.

**(5)** Nothing in the amendments made by the Psychotropic Substances Act of 1978 or the regulations or orders promulgated thereunder shall be construed to preclude requests by the Secretary of Health and Human Services or the Attorney General through the Secretary of State, pursuant to article 2 or other applicable provisions of the Convention, for review of scheduling decisions under such Convention, based on new or additional information.

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5. Section 812 of Title 21 of the U.S.C. provides, in relevant part:

**Schedules of controlled substance.**

**(a) Establishment**

There are established five schedules of controlled substances, to be known as schedules I, II, III, IV, and V. Such schedules shall initially consist of the substances listed in this section. The schedules established by this section shall be updated and republished on a semiannual basis during the two-year period beginning one year after October 27, 1970, and shall be updated and republished on an annual basis thereafter.

**(b) Placement on schedules; findings required**

Except where control is required by United States obligations under an international treaty, convention, or protocol, in effect on October 27, 1970, and except in the case of an immediate precursor, a drug or other substance may not be placed in any schedule unless the findings required for such schedule are made with respect to such drug or other substance. The findings required for each of the schedules are as follows:

(1) SCHEDULE I.—

**(A)** The drug or other substance has a high potential for abuse.

**(B)** The drug or other substance has no currently accepted medical use in treatment in the United States.

**(C)** There is a lack of accepted safety for use of the drug or other substance under medical supervision.

* * * * *

**(c) Initial schedules of controlled substances**

Schedules I, II, III, IV, and V shall, unless and until amended[1] pursuant to section 811 of this title, consist of the following drugs or other substances, by whatever official name, common or usual name, chemical name, or brand name designated:

SCHEDULE I

* * * * *

**(c)** Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation, which contains any quantity of the following hallucinogenic substances, or which contains any of their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

* * * * *

**(6)** Dimethyltryptamine.

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6. Section 841 of Title 21 of the U.S.C. provides, in relevant part:

**Prohibited acts A**

**(a) Unlawful acts**

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

**(1)** to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

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[1] Revised schedules are published in the Code of Federal Regulations, Part 1308 of Title 21, Food and Drugs.

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7. Section 844 of Title 21 of the U.S.C. provides, in relevant part:

**Penalties for simple possession**

**(a) Unlawful acts; penalties**

It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II of this chapter. It shall be unlawful for any person knowingly or intentionally to possess any list I chemical obtained pursuant to or under authority of a registration issued to that person under section 823 of this title or section 958 of this title if that registration has been revoked or suspended, if that registration has expired, or if the registrant has ceased to do business in the manner contemplated by his registration. Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of $1,000, or both, except that if he commits such offense after a prior conviction under this subchapter or subchapter II of this chapter, or a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years, and shall be fined a minimum of $2,500, except, further, that if he commits such offense after two or more prior convictions under this subchapter or subchapter II of this chapter, or two or more prior convictions for any drug, narcotic, or chemical offense chargeable under the law

of any State, or a combination of two or more such offenses have become final, he shall be sentenced to a term of imprisonment for not less than 90 days but not more than 3 years, and shall be fined a minimum of $5,000. Notwithstanding the preceding sentence, a person convicted under this subsection for the possession of a mixture or substance which contains cocaine base shall be imprisoned not less than 5 years and not more than 20 years, and fined a minimum of $1,000, if the conviction is a first conviction under this subsection and the amount of the mixture or substance exceeds 5 grams, if the conviction is after a prior conviction for the possession of such a mixture or substance under this subsection becomes final and the amount of the mixture or substance exceeds 3 grams, or if the conviction is after 2 or more prior convictions for the possession of such a mixture or substance under this subsection become final and the amount of the mixture or substance exceeds 1 gram. Notwithstanding any penalty provided in this subsection, any person convicted under this subsection, for the possession of flunitrazepam shall be imprisoned for not more than 3 years, shall be fined as otherwise provided in this section, or both. The imposition or execution of a minimum sentence required to be imposed under this subsection shall not be suspended or deferred. Further, upon conviction, a person who violates this subsection shall be fined the reasonable costs of the investigation and prosecution of the offense, including the costs of prosecution of an offense as defined in sections 1918 and 1920 of title 28, except that this sentence shall not apply and a fine under this section need not be imposed if the court determines under the provision of title 18 that the defendant lacks the ability to pay.

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8. Section 2000bb of Title 42 of the U.S.C. provides:

**Congressional findings and declaration of purposes**

**(a) Findings**

The Congress finds that—

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right,

secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to

interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

**(b) Purposes**

The purposes of this chapter are—

(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

9. Section 2000bb-1 of Title 42 of the U.S.C. provides:

**Free exercise of religion protected**

**(a) In general**

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

**(b) Exception**

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling government interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

**(c) Judicial relief**

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

10. Section 2000bb-2 of Title 42 of the U.S.C. provides:

**Definitions**

As used in this chapter—

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other persons acting under color of law) of the United States, or of a covered entity;

(2) the term "covered entity" means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means religious exercise, as defined in section 2000cc-5 of this title.

11. Section 2000bb-3 of Title 42 of the U.S.C. provides:

**Applicability**

**(a) In general**

This chapter applies to all Federal law, and the implemetation of that law, whether statutoryor otherwise, and whether adopted before or after November 16, 1993.

**(b) Rule of construction**

Federal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicity excludes such application by reference to this chapter.

**(c) Religious belief unaffected**

Nothing in this chapter shall be construed to authorize any government to burden any religious relief.